



APPROACHES TOWARDS THE CONCEPT OF NON-PECUNIARY LOSSES DERIVING FROM BREACH OF CONTRACT

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A thesis to be submitted to the
Department of Law of the
London School of Economics and Political Science for the degree of
Doctor of Philosophy

London
2019

Declaration

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Abstract

This thesis examines the nature of non-pecuniary losses deriving from breach of contract. It introduces the concept of contractual interest whose purpose is to connect the contents of the agreement with the consequences of its breach. The contractual interest comprises the stipulated subject-matter and the aim that the promisee achieves with its delivery. In English legal theory the concept of contractual aim is new, but in every agreement the promisee pursues a certain outcome that is achievable as a result of the performance. The aims of the agreement would be consequent on the performance, and the promisee should be able to enjoy all of them. Both pecuniary and non-pecuniary aims can be pursued in a single contract. This possibility determines the wide scope of the contractual interest that the promisee might have in the performance. If the promisee aims to achieve something further than a sole enhancement of his financial position, then he will have a non-pecuniary contractual interest. The non-pecuniary interest can exist in all sorts of agreements regardless of their subject-matters or the type of their parties. This interest determines the consequences of the breach too. Notwithstanding the particular factual circumstances in which the non-performance is materialised, the promisee's inability to achieve his aims is the only factor that defines the nature and the scope of the harms that he suffers. The non-pecuniary losses are all consequences resulting from the non-fulfilment of the promisee's aims. This new understanding reveals the wider scope that the non-pecuniary harms can have and their much more extensive injurious effects. A complete and exhaustive description of the losses that are caused in such cases will entail an identification of all non-pecuniary aims that would had been pursued at the contractual formation and the consequent failure of their achievement.

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1. Introduction

A breach of contract may sometimes cause non-pecuniary losses. Their forms can diverge significantly – from physical inconvenience and discomfort, through disappointment and vexation, to severe mental distress and other diseases. Despite this multiplicity, the invariable common particularity of non-pecuniary losses is that they affect some of the promisee's interests, but do not lead to his¹ immediate financial impoverishment. He is divested of a non-financial benefit that he legitimately expects to receive. Such harms² have not always been acknowledged by the parties or the courts. In many cases damages for non-pecuniary losses were not claimed by the promisee at all.³ In others⁴ it was held that although such harms might have been inflicted, they were not to be recovered. English courts have been generally reluctant to award damages for non-pecuniary losses.

The recoverability of damages for non-pecuniary loss is considered to be problematic for various reasons. Firstly, contracts are generally perceived as aiming to provide financial profits, where no room for emotional or sentimental injury is available.⁵ Secondly, these losses are not thought to be within the contemplation of the parties at the time when they formed the contract.⁶ Even if the parties could anticipate the infliction of such losses, it was thought that such occasions should be met with sufficient fortitude and resilience which do not justify any remedies at all.⁷ Thirdly, the irrecoverability of damages non-pecuniary losses is also related to the perceived impossibility of a direct monetary assessment of the affected interests. Fourthly, the scope of these types of harms might be significantly broad and many of them have an intangible nature – injury to the promisee's feelings, health, artistic, aesthetic or scientific interests. This leads to some difficulties with regard to their proof. Lastly, non-pecuniary losses cannot be made good by payment of monetary compensation.

Yet these problems are not insurmountable. In tort law, non-pecuniary losses are recoverable on a much wider basis.⁸ Besides, some of the problems that are associated with compensation of non-pecuniary losses affect other harms and could be resolved by principles that are already applicable to the other remedies available in cases of contractual non-performance. If monetary compensation cannot substitute the harmed intangible benefits *per se*, it can provide satisfaction of other needs and pave the way to alternative values that can offset the promisee's suffering. A wider recoverability of all losses that are caused by breach will correspond with the liberty of the parties to pursue non-pecuniary aims with their agreements. In such cases, if the contract is not performed, the promisee would be entitled to receive monetary compensation for his harms.

¹ In the present work the masculine gender of the pronouns will be used for simplicity, but all references should be considered as being made to an indeterminate gender.

² In the present work the terms "harms" and "losses" are used interchangeably, *cf.* McGregor, *McGregor on Damages*. 20th Edition, 2019, London: Sweet & Maxwell, para 3-010 where similar equivalent usage of these terms seems to be adopted.

³ *Liverpool City Council Respondents v Irwin and Another Appellants* [1976] 2 W.L.R. 562.

⁴ *Branchett v Beaney* [1992] 3 All ER 910.

⁵ *Watts v Morrow* [1991] WLR 1421, 1445.

⁶ *McGregor on Damages*, *op. cit.*, para 5-024.

⁷ Clapton, Mysty and Mitchell McInnes, 2007. Contractual Damages for Mental Distress. *Law Quarterly Review*, 123 (Jan), 26 – 29.

⁸ *McGregor on Damages*, *op. cit.*, para 5-002.

It is thought typically that when damages for non-pecuniary losses are explored, the question of their recoverability is the most important one. Even so, the present thesis takes a step back. Rather than reiterating some of the modern tendencies that promote full recovery of all losses, it aims to provide a wider perspective by which damages for non-pecuniary losses deriving from contractual non-performance might be conceived. Instead of exploring the problem of their recovery at the outset, it studies the setting where this question might be placed and offers a new perspective through which the nature and the scope of non-pecuniary losses might be apprehended.

The present introductory chapter comprises three concise parts. The first explores the problems that the recovery of damages for non-pecuniary losses raises both in English law and in the legal scholarship. It then sketches the deficiencies of the current system of indemnification and justifies the necessity of a new understanding of the nature of non-pecuniary losses. The second part outlines the contents of the present thesis with its research question, scope, and aims. The final part of this chapter describes the methodology that is adopted through the thesis.

A. The Contemporary Perception of the Nature of Non-Pecuniary Losses

The present thesis is not primarily concerned with the recoverability of damages for non-pecuniary losses. However, the nature of these harms cannot be understood without an initial introduction of the setting in which they have been perceived both in legal scholarship and in case law. Non-pecuniary losses have always been explored only with regard to their possible indemnification. The aim of the present section is to explain why this perception cannot provide a comprehensive and complete picture of the nature of non-pecuniary losses. This section has three subsections. The first explores the current law on recoverability of damages for non-pecuniary losses. It includes short outlines of all major cases that will be examined throughout this thesis. The second subsection looks into the contemporary literature on recovery of damages for non-pecuniary losses. The last subsection outlines the gaps that exist in the modern scholarship and justifies the necessity of a new approach towards the nature of non-pecuniary losses.

(a) Recoverability of Damages for Non-Pecuniary Losses in English law

The necessity of a new approach towards the recovery of damages for non-pecuniary losses does not need to be justified on an encyclopaedical representation of the current law or the legal literature that examines it. Indeed, there are no exhaustive treatises or monographs on damages for non-pecuniary losses published in England or Wales. A small number of individual articles and chapters from larger works examine certain aspects of this topic. Most of them are concerned primarily with the general impossibility of redress in cases where non-pecuniary losses were caused. However, before pointing out some of the most interesting parts of them, it is useful to have a brief review of the leading cases, which are analysed in detail in other parts of the thesis, for the current status of the law is more easily explained from the chronological perspective in which the present norms originate.

The principal position of English law is that damages for non-pecuniary losses are recoverable in two groups of cases only. The first comprises instances where physical inconvenience or discomfort were caused by the breach, and the second group includes cases where one of the major and important objects of the contract was to provide enjoyment or other

sentimental benefit to the promisee. The law reached this position gradually over the last century. The initial understanding was that the contracts are concluded to protect the financial interests of the parties and, consequently, non-pecuniary losses were considered to be irrecoverable. These harms were believed to derive from other interests which were not deemed to be suitable for protection by contractual law remedies. A series of subsequent decisions established limited exceptions to this principle.

During the nineteenth century the courts applied a rather restrictive approach towards the type of contracts in which non-pecuniary losses could be recovered. It was held usually that redress could be awarded only when physical inconvenience of a sufficiently serious degree was caused. In *Hobbs and Wife v The London and South Western Railway Company*⁹ the plaintiff bought railway tickets for himself, his wife and their two children from Wimbledon to Hampton Court for the last service of the day. The train went along another branch of the line and the promisees had to alight at an alternative stop which was about two miles away from the station which they had tickets for. Being unable to find alternative transportation to their final destination or accommodation in the place where they had to alight, the family walked to their house during the rainy night. The wife caught a cold which impeded her from assisting in her husband's business and incurred medical expenses for her treatment. The Divisional Court decided that the damages for the inconvenience suffered in consequence of being forced to walk to their house out to be compensated, but those resulting from the wife's illness and its consequences were too remote and, therefore, irrecoverable.

The main case considered to restrict damages for non-pecuniary losses in English law is *Addis v Gramophone Co.*¹⁰ The plaintiff worked as a manager in the defendant's company and pursuant to the contract concluded between them, the employment could be terminated after a notice of six months. The defendant served such notice, but, prior to the expiration of the term of six months, had limited the plaintiff's rights to act as a manager and thus deprived him of receiving a larger commission. It was held that this was a contractual breach and the plaintiff was entitled to receive compensation for the pecuniary losses he had suffered, but not for the harsh and humiliating manner in which he was dismissed. The importance of this case for the present analysis lies not in its purportedly restrictive effect upon the general recoverability of damages for non-pecuniary losses, but in its reception by the judiciary and in the academic literature where this case exerted its indirect, but very powerful influence.

A few decades later it was decided that in specific circumstances where the contract aims to provide entertainment, or other sentimental benefit, damages for mental distress can be recovered. In *Jarvis v Swan's Tours Ltd*¹¹ the plaintiff was a solicitor who worked for Barking Council in Greater London. For his annual holiday he chose to go to a ski resort in Switzerland where he was promised to have a welcome party on arrival, afternoon tea and cakes for seven days, Swiss dinner by candlelight, a fondue party, and a yodeller evening amongst other things. His expectations were not met. The house party was attended only by 13 people in the first week and none in the second. No one could speak English, except the plaintiff himself. He was very disappointed with the skiing too. There were also no Swiss cakes. The county court found that during the first week the promisee had a holiday which was partially inferior and, for the second week, very

⁹ (1875) L.R. 10 Q.B. 111.

¹⁰ [1909] AC 488.

¹¹ [1973] QB 233, CA.

largely inferior to what he had been led to expect and it awarded him £31.72 damages. The Court of Appeal held, allowing the claimant's¹² appeal against the quantum of damages, that he was entitled to be compensated for his disappointment and distress deriving from the loss of the entertainment and the facilities for enjoyment which he had been promised and his compensation was increased to £125.

Another leading case where the primary or important part of the object of the contract was to provide emotional contentment is *Ruxley Electronics and Construction Ltd v Forsyth*.¹³ The promisee contracted for a swimming pool to be constructed with the depth at the deep end of seven feet and six inches. The pool built by the promisors was in fact six feet and nine inches only, but it was still entirely safe for swimming and diving. The value of the promisee's property was not affected by this breach of contract. When the building companies sued the promisee for the balance of the contractual price, he counterclaimed for the cost of rebuilding the pool to the initially agreed depth. The county court dismissed the promisee's counterclaim and instead awarded him damages for loss of his amenity in the amount of £2,500. The promisee appealed this decision. The Court of Appeal allowed his appeal and held that he should be awarded the amount that was needed for rebuilding the pool. Then the promisors appealed the decision. The House of Lords allowed their appeal and upheld the county court's award of £2,500 for loss of amenity. It was held that although the promisee had not suffered any immediate financial loss, he was deprived of the consumer surplus that the contract was due to provide¹⁴ or that he suffered loss of enjoyment.¹⁵

The exceptional circumstances in which damages for non-pecuniary losses are recoverable were also confirmed in other cases. In *Watts v Morrow*¹⁶ it was decided that damages deriving from mental distress which is directly consequent on physical inconvenience are recoverable. The plaintiffs instructed the defendant to survey and advise them on the structural and general condition of a property in the countryside which they wanted to purchase and use as a summer residence. In reliance on the information provided by the defendant, they bought the property for £177,500. On entering into possession, defects beyond those described in the defendant's report were discovered. The plaintiffs carried out some repair work at a cost of £33,961. The first instance court held that the plaintiffs were entitled to damages of £33,961.35 for the cost of the repairs and general damages for distress and inconvenience, of £4,000 for each plaintiff. The Court of Appeal confirmed that in circumstances when physical inconvenience and discomfort were caused, damages for non-pecuniary losses were recoverable, but held that the amount of damages awarded by the county court was excessive and reduced it accordingly.

The principle that damages for non-pecuniary losses might be recoverable in exceptional cases was confirmed in *Farley v Skinner*.¹⁷ The plaintiff was considering buying a house not far from Gatwick Airport and engaged the defendant as his

¹² Throughout this thesis the parties to a contract who can suffer non-pecuniary losses as a result of breach are referred to as 'promisees' irrespective of the fact that they might be promisors with regard to another obligation in a synallagmatic contracts. Appellations denoting their procedural roles like 'claimants', 'defendants', 'respondents' and 'appellants' are used only where citations or references to particular proceedings are provided.

¹³ [1996] AC 344.

¹⁴ *Ruxley, op. cit., per Lord Mustill*, at 360.

¹⁵ *Ruxley, op. cit., per Lord Lloyd*, at 373.

¹⁶ [1991] 1 WLR 1421, CA.

¹⁷ [2001] UKHL 49.

surveyor. He specifically requested him to investigate if the property was affected by aircraft noise and the surveyor reported that it was unlikely that the house would suffer greatly from such noise. In fact, aircraft noise substantially affected the property. Having decided not to sell, the claimant sued the surveyor in the tort of negligence and for breach of contract. The High Court awarded him £10,000 for the discomfort. On appeal, a two judge Court of Appeal¹⁸ was unable to reach an agreement on this case, and then the case was examined by a three judge Court of Appeal who held¹⁹ that the contract in question did not purport to provide peace of mind and avoid distress, and damages for such losses were not, therefore, recoverable and, moreover, that the annoyance caused to the claimant by the aeroplane noise did not amount to physical discomfort or inconvenience. The House of Lords allowed the appeal and restored the High Court order, confirming the principle that damages for non-pecuniary losses could be recovered where an important object of the contract was mental satisfaction or freedom from distress, even though that was not its sole, or predominant, object.

(b) Literature on Recoverability of Damages for Non-pecuniary Losses

There are no books or larger scholarly works that explore the nature of non-pecuniary losses or any other question related to this topic. The basic positions of English law examined in the previous subsection are reproduced very concisely in most textbooks on contract law.²⁰ There are also several monographs exploring the remedies for non-performance²¹ or contract damages²² in particular, which provide very short accounts of the problems related to the recovery of damages for non-pecuniary losses. The articles that examine damages for non-pecuniary losses could be divided into three major subgroups. The first, similarly to the established textbooks, provides a succinct overview of the general legal regime that is applied in relation to non-pecuniary losses,²³ including from a comparative perspective.²⁴ The second group explores some specific aspects of these harms – quantification of the damages,²⁵ particular loss of aesthetic or emotional enjoyment,²⁶ mechanisms for restriction of the recovery of such damages²⁷ and others²⁸. The third subgroup of articles

¹⁸ 1999 WL 1048346.

¹⁹ [2000] P.N.L.R. 441, Clarke L.J. dissenting.

²⁰ Peel, E., (ed.), 2015. *Treitel on The Law of Contract* 14th edn, London: Sweet & Maxwell, para. 20-082 – 20-092; son, Burrows and Cartwright (eds), 2016. *Anson's Law of Contract*, 30th edn, at 566-568 and Beale, H. (ed.), 2018. *Chitty on contracts*. 33rd ed. London: Sweet & Maxwell, para 1-021., para 26-151 – 26-159.

²¹ Rowan, Solène, 2012. The Compensation of Non-Pecuniary Loss. In: *Remedies for Breach of Contract*. Oxford University Press, Oxford, 121 – 128 and Burrows, A., 2019. *Remedies for Torts, Breach of Contract, and Equitable Wrongs*. 4th ed. Oxford: Oxford University Press.

²² Kramer, A., 2017. *The Law of Contract Damages*. 2nd ed. Oxford and Portland, Oregon: Hart Publishing and 2009. *McGregor on Damages*, *op. cit.*

²³ Jackson, Bernard S., 1977. Injured Feelings Resulting from Breach of Contract. *International and Comparative Law Quarterly*, 26 (Issue 03, July 1977), 502 – 515; Dawson, Francis, 1983. General Damages in Contract for Non-Pecuniary Loss. *New Zealand Universities Law Review*, 10 (June 1983), 232 – 260;

²⁴ Bridge, Michael G., 1984. Contractual Damages for Intangible Loss. *The Canadian Bar Review*, 62, 323 – 370.

²⁵ Mullen, Stephanie, 2015. Damages for Breach of Contract: Quantifying the Lost Consumer Surplus. *Oxford Journal of Legal Studies*, Vol. 36, No. 1 (2016), pp. 83–109.

²⁶ Kastely, Amy H., 1986. Compensation for Lost Aesthetic and Emotional Enjoyment: A Reconsideration of Contract Damages for Nonpecuniary Loss. *University of Hawaii Law Review*, 8, 1 – 30.

²⁷ McCamus, John D, 1996. Mechanisms for Restricting Recovery for Emotional Distress in Contracts. *Loyola of Los Angeles Law Review*, 42, 51 – 90.

²⁸ *cf. e.g.* Yates, David, 1973. Damages for Non-Pecuniary Loss. *The Modern Law Review*, 36 (5), 535-541; Burrows, A. S., 1984. Mental Distress Damages in Contract – a Decade of Change. *Lloyd's Maritime and Commercial Law Quarterly*, 1984, 119 – 134.

interprets some of the leading cases.²⁹ None of these works studies the nature of non-pecuniary losses. They make certain claims about the possible ways of compensating these harms. However, it will be argued that these suggestions are not founded on sufficiently detailed and comprehensive analysis of the structure of the contractual relationship or the promisee's interests in the contractual performance.

Thus, some articles, along with analysis of the current system of indemnification, argue for wider recoverability of damages for non-pecuniary losses. They substantiate their views that greater recognition of damages for distress or other specific forms of mental suffering is needed by drawing an analogy with the existing system that is currently applied in relation to financial losses. Such analyses take different forms. The most common one assumes that if more general recoverability of these losses is adopted, this would fit well within the current model that English contract law employs.³⁰ Alternative interpretations of the leading cases have also been offered.³¹ They suggest, for instance, that *Addis* should not be considered as an authority which aims to limit the recovery of damages for mental distress. Other authors³² raise similar arguments that the general unavailability of damages for mental distress contradicts the basic principles on which contract compensation is principally awarded. They argue that the difficulty in assessing damages for mental distress can be resolved reasonably within the existing system of indemnification in English contract law and that recovery should extend to all cases except those where the sole purpose in contracting was to obtain some financial benefit.

(c) Gaps in English Literature

All scholarly works on non-pecuniary losses deriving from contractual non-performance written in the past few decades focus on the question of when damages are or should be recoverable. The reasoning that stands behind the possible compensation of non-pecuniary losses is sometimes problematic and much of these works explore this question in limited depth and scope. As such, there has been little opportunity for an exhaustive and comprehensive explanation of the nature of non-pecuniary losses. In particular, most of the cases do not attempt to explore the essence of these harms. This limited approach fails to examine the relationship between the contents of the contractual interest and the nature of the losses that result from breach. Instead, the reasoning adopted in the cases often appears to be based on policies which look beyond the parties' own contractual relationship. The scholarly works reflect and analyse the authorities similarly. The present thesis will suggest that the principal gap that exists in the legal literature in relation to damages for non-pecuniary losses is the lack of explanation of their essence from what might be called a purely contract law perspective.³³

²⁹ Lawson, R. G., 1974. Breach of Contract and Damages for Disappointment. *The Solicitors' Journal* 118 (11 January 1974), 16; Blackshaw, Ian S., 1976. Damages for Demotion and Distress. *New Law Journal*, 11 (March), 255 – 256; McKendrick, Ewan and Martin Graham, 2002. The Sky's the Limit: Contractual Damages for Non-Pecuniary Loss: *Farley v Skinner*. *Lloyd's Maritime and Commercial Law Quarterly*, 2002 (Part 2), 161 – 169.

³⁰ *cf.* Lewis, J., 2008. Can Damages Buy You Happiness? Damages for Distress after *Farley v Skinner*. *King's Law Journal*, 19, 113-134; Tettenborn, Andrew, 2003. Non-Pecuniary Loss: the Right Answer, but Bad Reasoning? *Journal of Obligations and Remedies*, December 2003, 94 – 107.

³¹ Enonchong, Nelson, 1996. Breach of Contract and Damages for Mental Distress. *Oxford Journal of Legal Studies*, 16, (No. 4, Winter, 1996), 617 – 640.

³² Macdonald, Elizabeth, 1994. Contractual Damages for Mental Distress. *Journal of Contract Law*, 7, 134 – 155.

³³ For further details about this method, *cf.* the present chapter, section C.

There are two logical positions from which the analysis of claims for damages for non-pecuniary losses might be approached. The first is based on the assumption that pecuniary and non-pecuniary losses are sufficiently similar and the question of their recovery should be resolved in an identical way. The alternative is to consider non-pecuniary losses as different and to justify their recovery, so far as it might be possible, on specific reasons applicable to them alone. Whichever approach is chosen, it is necessary to go beyond the analysis found in the existing literature. A better understanding of the nature of contractual relationships where non-pecuniary losses might be caused is needed. In that respect some of the conclusions found in the existing scholarship are questionable. For instance, it is thought that such losses might be incurred in specific contracts only.³⁴ Additionally, if it is established that the presence of non-pecuniary losses is not determined by the subject matter of the particular contract, then the origin and the legal mechanisms by which such losses are caused should be studied. Thirdly, a clearer and more comprehensive distinction between pecuniary and non-pecuniary losses should be drawn. Finally, it might be suitable to explore the differences in the promisee's contractual interest when pecuniary and non-pecuniary losses are caused.

Another major deficiency in the existing legal literature is the lack of a detailed explanation of the nature of non-pecuniary losses. There are different perspectives through which this can be achieved, but none of them seems to have been pursued. On the one hand, the relationship between breach, its consequences and non-pecuniary losses might be explored. Another possibility is to examine the essence of these losses as a consequence of the lack of the promised benefit and explain their nature in relation to the contractual subject matter. There are options for combined approaches or the involvement of additional elements of the contractual relationship on which basis the losses might be represented. There could also be other theories that might examine non-pecuniary losses not within the structure of the contractual relationship, but in relation to their philosophical, social or other implications. These approaches are not mutually exclusive. On the contrary – a better exploration of this topic could only be achieved if non-pecuniary losses are examined from various perspectives. However, such a task is not achievable within a single doctoral project. Indeed, the gap in the legal scholarship is so large that it would take many prospective works to fill it in.

If a fuller answer to the question of the nature of non-pecuniary losses is provided, then a third group of topics that have not been addressed in the legal literature previously can be identified. These topics would offer an alternative perspective to the reasoning that has already been espoused by the established authorities and authors who think that such losses are not recoverable. The orthodox understanding sees this restriction as based primarily on policy arguments. An alternative approach might be able to explain the inadequacy of the policy line of reasoning and find a new answer to the question of recoverability of non-pecuniary losses. This new perspective could be based on a clearer understanding of the nature of these harms and their relationship with the other elements of the contractual obligation.

Regardless of the possible perspectives through which the general question of the recoverability of non-pecuniary losses might be considered, it seems that its contemporary perception reveals certain deficiencies. On the one hand, these deficiencies could be explained on the ground of the limited number of exceptions where English law allows damages for

³⁴ *Cointat v Myham & Son* [1913] 2 K.B. 220 or *Anglo-Continental Holiday Ltd v Typados Lines (London) Ltd* [1967] 2 Lloyd's Rep. 61.

such losses to be recovered. This restrictive approach does not seem to be founded on a particular contract law concept or broader idea. It might be more suitable to explore the nature and the peculiarities of non-pecuniary losses prior to addressing the problem of their recovery. Although it might seem that there is no direct and upfront explanation through which these deficiencies could be addressed, the analysis of non-pecuniary losses in orderly and systematic manner, which takes into consideration their place within the structure of the contractual relationship, and, as it will be further examined, regardless of the nature of the contractual subject matter or the manner in which the contract might have been breached, ought to provide a workable approach.

B. The Necessity of a New Approach towards the Nature of Non-pecuniary Losses

Aside from the limited scope of the contemporary legal literature, there are further challenges facing prospective research into the nature of non-pecuniary losses. The reasons for the complexity of such an endeavour are found not only in the difficulty in identifying the most appropriate answers to questions about the recovery of damages for non-pecuniary losses, but also in the limited perspectives through which they are usually approached. Therefore, rather than attempting to provide a direct answer to the problem of the recoverability of damages for non-pecuniary losses, the present work will address the gaps in the legal literature in a more intelligible and exhaustive manner. It will aim to offer a full account of the approach that could be adopted in relation to these losses. This perspective is not the only possible way in which non-pecuniary losses might be analysed, but on the level of a purely doctrinal contract law analysis it will aim to represent an exhaustive and complete theory of their nature – something which is completely novel to English contract law doctrine.

Three subsections explore the necessity for a new approach to understanding the nature of non-pecuniary losses. They examine consecutively the aims of this approach and the research question that this work will answer. The present subsection also includes a short overview of the structure and the contents of the thesis.

(a) Aims

The main aim of the present work is to establish a new understanding of the nature of non-pecuniary losses. The scholarly merits of such an endeavour should not be doubtful – the advancement of the human knowledge ought to be considered as self-sufficient necessity always. Even so, there are other considerations of practical and theoretical importance that support the pursuit of this aim. Hence a better account of non-pecuniary losses will reveal that they may be suffered in many more cases than ordinarily thought.

During the last few decades some scholars³⁵ have also supported a more humanistic and liberal understanding of the role of contract law. With the increasing wealth of contemporary society, other values beyond protection of the economic

³⁵ cf. e.g., Friedmann, D., 1995. The performance interest in contract damages. *Law Quarterly Review*, 111(Oct), 628-654 and McKendrick, Ewan and Katherine Worthington, 2005. Chapter 13: Damages for Non-Pecuniary Loss. In: Cohen, Nili and Ewan McKendrick eds. *Comparative Remedies for Breach of Contract*. Oxford and Portland, Oregon: Hart Publishing, 287-322.

and financial welfare of its members are also seen as significant.³⁶ In that respect, contract law is regarded as an instrument that can be used to uphold other non-economic interests too. If someone wishes to provide a better vacation for themselves, a more comfortable trip or to improve their home, in most cases they will have no other opportunities but to resort to specific contracts. The law should be able to ensure that, in cases of non-performance, all these interests are protected and that the promisee would receive a fair compensation in case of non-performance. In order to achieve such a result, the present work will also offer a broader understanding of what the contractual interest is.

There are currently several policy arguments which try to justify the lack of general recoverability of damages for non-pecuniary losses. The present work will not engage with them directly, but it will purport to demonstrate that there are no premises within the theory of English contract law or law on contractual damages on which a bar for general recoverability of such harms can be justified. These purely extra-legal arguments that are conveniently disguised as policy considerations, will be addressed with analysis of the principles and theoretical mechanisms on which the contemporary law of contractual damages is based. Thus, the present work will have an unexpected policy-orientated aim – to demonstrate the importance and the vast number of instantiations of non-pecuniary losses. Its objective will be to show that such harms might be suffered by any person, natural or legal, and in any contractual relationship regardless of its subject matter. In that respect this thesis will aim to reverse the perspective through which non-pecuniary losses have been perceived in the legal scholarship.

The last aim of this thesis will be to demonstrate that this approach can defeat some short-sighted arguments with doubtful advantages and effects. Private law should not serve political concepts with uncertain origin and dubious justifications. This thesis will establish that, if there are good reasons for which damages for non-pecuniary losses should not be recoverable, they are not to be found in their inherent characteristics and effects on the promisee's interest in the performance.

(b) Research Questions

The main research question of the present work will be what the nature of non-pecuniary losses is. Although this query sounds somewhat unsophisticated, a comprehensive response requires a thorough and complete examination of all features that non-pecuniary losses exhibit and an explanation of their origin and relationship with other elements of the contract. It could not be otherwise for at least two reasons. On the one hand, the present analysis aims to approach the concept of non-pecuniary losses as it could be conceived within the structure of the agreement. This perspective can place these harms in the setting in which they originate and thus provide a better grasp of their intrinsic features. The various elements of the contractual relationship neither exist independently of each other nor do they exert their effects on the promisee in insolation. On the other hand, the aim of the present work is to represent the most detailed and exhaustive account of the nature of non-pecuniary losses deriving from contractual non-performance. This thesis surpasses all previous occasions when this question was examined not only in its comprehensiveness, but it also provides

³⁶ For a more general perspective on the new values that the contemporary legal system protects, *cf. eg.* Arden, Mary, 2015. *Common Law and Modern Society: Keeping Pace with Change*. Oxford: Oxford University Press.

a completely new theory about the setting in which these harms are formed and the wider contents and distinctive features that they have.

This perspective requires separation of the main research question into two sub-questions. The first enquires into the origin of non-pecuniary losses. This question should be understood broadly. It explores the circumstances in which harms of this type are caused. It examines the relationship between these losses and the other elements of the contract and looks into the features that determine the non-pecuniary nature of these harms. It also seeks to establish the principles that differentiate the losses from the other consequences of the non-performance. Apart from this more classical approach towards the origin of the harms, this first sub-question will also identify the constitutive elements of the agreement which define the presence of non-pecuniary losses in case of breach. It will be argued that this is not dependent on the breach or any other factual circumstances that can affect the life of the agreement after its formation. One of the main functions of the question about the origin of non-pecuniary losses will be to identify those elements of the contractual relationship which determine the possible presence of such harms. It will be submitted that these elements are not the stipulated subject matter or the particular rights or obligations that the parties have towards each other, but what it will be called further in this work the promisee's non-pecuniary contractual interest.

The second question is about the concept of non-pecuniary losses. Its scope includes examination of the changes in the contractual relationship after breach and identifies the exact mechanisms that bring non-pecuniary losses to life. Its main purpose is to derive a new concept of non-pecuniary losses based on the interaction that they could have with other components of the agreement. This question aims to establish the defining features of non-pecuniary losses and their characteristics, which distinguish them from the other harms caused by the breach. The new approach toward the concept of non-pecuniary losses will challenge the existing narrow apprehension of loss. It will enquire into the distinctive traits of these harms and will establish the inappropriateness of some contemporary narrower understandings of their scope. Lastly, this question will also explore the different ways in which the promisee can be affected by these harms. Their injurious effect will be examined from the perspective of his non-pecuniary contractual interest. The second sub-question will enquire into the ways in which non-pecuniary losses could affect the various forms that the promisee's non-pecuniary contractual interest can take in a single agreement. This perspective will be able to provide a more accurate account of the wider scale in which non-pecuniary losses can affect the promisee.

(c) Outline of the contents

The present thesis consists of two chapters. The first explores the contractual relationship before breach. Its aim is to identify and describe the specific features exhibited by contracts where non-pecuniary losses could be caused. It looks firstly into the possible distinction between pecuniary and non-pecuniary losses. Then it proceeds to explore the main feature that will be applied for this differentiation – the promisee's aim for which he concludes the contract. This aim represents the immediate outcome that the promisee receives as a result of the performance. Lastly, a detailed review of the promisee's non-pecuniary contractual interest follows. The contractual interest, as it is presented in the present thesis, is a new concept with a more precise meaning and content than the notion of the expectation interest or other similar terms. The proposed concept of contractual interest identifies not merely the aggregation of rights that ensure

the delivery of the stipulated subject matter, but the overall importance that the performance of the agreement has to the promisee.

The second chapter examines the contractual relationship after breach. Its aim is to describe the effects of non-performance and its role in the infliction of non-pecuniary losses. This chapter looks into the nature of the breach and its formative role in the causal chain of events leading to the claimant suffering non-pecuniary harms. The changes to the contractual interest caused by breach are also described. The chapter provides finally a new understanding of the nature of non-pecuniary losses as they could be perceived from the perspective of the promisee's incapability to attain his contractual interest.

This thesis does not need a detailed conclusion. The analysis follows the natural life of the contractual relationship from the time of its formation to the moment when its non-performance causes non-pecuniary losses. Thus the last section of the second main chapter is a logical conclusion that provides the end of the story about the constitutive elements of the agreement, the interactions between themselves and their role for determination of the specific features of non-pecuniary losses. At the end of this work the last paragraphs offer some final observations. They do not restate the conclusions that are already made elsewhere in the text. Instead, they reflect on the general overview of the perspective to non-pecuniary contractual interest and non-pecuniary losses which is explored throughout the thesis and outline the possible approaches that could be adopted for a better understanding of the compensation that could be due for recovery of these harms.

C. Methodology

The present section explores the methodology that is adopted throughout the thesis. It describes the epistemological model that is used for justification of the theory of non-pecuniary losses. This section has three separate subsections. The first one examines the sources from which the study commences. While in some positivistic approaches the existing legal norms could be sufficient for representation of a particular topic, the bases on which the analysis of the present work is founded are to be sought in more general principles of legal reasoning. The second subsection explains how this could be achieved. It offers a description of an epistemological model of hierarchical subordinated principles which form a multifaceted network of inductive reasoning. This model does not aim to perceive the law as a social system of norms, but to explore it from a more sophisticated epistemological perspective. This perspective aims to eliminate the flaws that the existing law exhibits. The last subsection explores how this could be possible. The abstract model of interrelated legal principles identified in the preceding subsection is transposed into concrete ideas by the power of deductive reasoning. This would allow for a new legal theory on the nature of non-pecuniary losses based on a comprehensive and subordinated conceptual network of legal principles and ideas with timeless epistemological significance.

(a) Sources

The aims of the present work will not be to provide a positivistic account³⁷ of English law on non-pecuniary losses. Its purpose is to explain why some of its current concepts about the nature of non-pecuniary losses can be justified from a certain perspective which goes beyond the apparent contents of the existing law. However, despite the departure from the purely positivistic manner in which these specific legal principles are justified, the aim of the present work is not to abandon the basic ideas and the internal logic which form the foundations of English contract law. Indeed, they are the main pillars that are used throughout the thesis in order to achieve its aims. This new perspective allows for identification of some of the fundamental problems that seem to have troubled this area of law, but which have not been recognised and explored thus far properly. Such an aim cannot be achieved by reference to some external justifications like morality or metaphysics. It rather requires a legal analysis of the principles that form the basis on which contemporary English contract law is founded.

The legitimacy of a legal analysis must be distinguished from the justification of the law which it aims to scrutinise. While the law is based entirely on its institutionalised existence through its sources³⁸ and needs nothing further for its validity, including for its applicability and binding effects, the legal analysis, as any social science, despite its specific object of description, requires justification of its merits. In other words, while the courts when applying certain legal norms or exploring general principles of English law are able to justify their merits on the grounds of their institutional existence, by a mere qualification that they are part of the legal system, an explanation of that law cannot do so – the sources of its legitimacy are elsewhere. They are to be identified in relation to its specific scholarly aims – to provide a coherent, systematic and intelligible account of the reasoning that stands behind the legal norms applied by the courts. The purposes of such legal theory are to explain the existing laws by examining the reasoning which lies behind them.

The present work does not aim to represent English law of damages for non-pecuniary losses, as a matter of fact, from its sociological and positivistic perspective, nor is its aim a presentation of a prescriptive model of it. The conclusions about what that law should be are sometimes inevitable—indeed the absence of any such deductions might undermine the whole epistemological purpose of a scholarly legal research,³⁹—but they are not the ultimate model that the present work aims to produce. The methodological approach that is adopted here must be able to provide not merely a different legal model that could fit into the wider conceptual structure of English contract law better than the current one. Rather, it aims to identify the most appropriate explanation of the law that can possibly regulate the recovery of non-pecuniary losses. This can only be achieved by adopting a suitable method that can lead to this end inevitably and conclusively. This could be nothing less, but a method that ensures that the justifications of all new rules are not simply better than the existing explanations, but the only appropriate ones, if they are to be compared to any conceivable alternatives.

The present work, rather than aiming to construct such a model, tries to explain the way in which it can be achieved, based on the specific knowledge that can be obtained from the law related to infliction of non-pecuniary losses. It has been said that the initial starting position for achieving this goal ought to be based on the existing law and should consist

³⁷ Hart, H., 2012. *The Concept of Law*. 3rd ed. Oxford: Oxford University Press.

³⁸ Webb, Charlie, 2014. Contract as Fact and as Reason. In: G. Klass, G. Letsas and P. Saprai, ed., *Philosophical Foundations of Contract Law*, 1st ed. Oxford: Oxford University Press, at 135.

³⁹ Webb, Charlie, 2011. The Double Lives of Property. *Jurisprudence*, 2 (1), 205-216, at 213 – 215.

of providing an evaluation or justification of its contents. This should be understood not merely as offering a possible good motive that can justify the existence of a single principle forming that body of law, but as being able to identify the reason that can provide meaning to it and explain it in the most intelligible and coherent manner. This reasoning, as it is further construed in this section, ought to be the inevitable and only possible deductive explanation of any single norm. The justification should, in other words, include in itself the whole meaning of that single norm, but on a more abstract and general level. If that single legal norm, represented on that higher semantic level as a single principle, in its concreteness and specificity, forms the basis of laws that the present thesis will be seeking to explain, then the imminent idea, which is the source from which that single legal principle can be derived and from which it receives its epistemological significance, is the justification and reason for its existence and meaning.

(b) Reduction

The present work does not aim to explain how legal reasoning should work generally. For the purposes of this section it will suffice to note that the justification of a basic legal idea is nothing more than a specific connection that is established with a more abstract legal principle through an inductive line of reasoning. This generalisation of simple legal norms aims to capture their epistemological value in a more universal and abstract manner, and by this inductive reasoning – to legitimise the validity of this new, broader understanding. Thus, it was decided in *Ruxley* that the claimant will not be entitled to receive the amount which was needed for repairing the swimming pool to the promised depth because such compensation would be too high compared to the advantages that will be achieved with it. An inductive reasoning that can justify this idea will be to conclude that the cost of reinstatement should not be unreasonably high compared to the advantage that the claimant might receive from that reinstatement. The level of abstraction here could be increased further and this idea might also be conceived as an instantiation of a more general principle that the redress which is available for obtaining of an alternative performance, for completion of a partial performance or for remedying a defective performance, should not be out of all proportion to the interest that the plaintiff might have in that performance.

The justification of a single legal concept for the purposes of the present scholarship would be understood not to have any other value or significance apart from being able to transmit the reasoning that is contained in another more general and abstract idea. The justification is the epistemological connection that can be established between that general idea and the single legal concept. This relationship is complex. A simple legal concept might be justified not by one, but by a combination of a few general ideas, within whose interaction this specific basic concept might be explained. Above each one of these more general concepts there are other more abstract ideas which provide legitimacy to them. This would mean that if a simple legal concept might be justified by two more general ideas, and if in turn each one of these ideas is justified by two more abstract principles, the initial basic concept would be a deductive result of six general legal principles of a higher conceptual order, which interact between themselves in a complex and hierarchically interrelated manner. Thus, in the example of *Ruxley*, along with the proposed justification of the rule for reinstatement, an additional idea might be added – regard must be had to the general performance interest that the promisee has in receiving the contractual benefit. The justificatory power of this other principle interrelates with the meaning that could be inferred

from the interaction of the other two principles which were already established so that the specific rule that can be identified in *Ruxley* is a product of a complex amalgamation of many principles of various levels of abstraction.

Behind the basic legal norms that form English law as a social phenomenon, there is a much deeper epistemological layer of rationale, which itself conceals, on a more abstract level, an even more complex structure of reasoning and justifications of the initial basic legal norms. This structure, which might be identified as a multifaceted network of inductive reasoning, should be the object of a scholarly research that aims to represent the law not as a social phenomenon, but as an object of epistemological representation. In other words, the law as it is explored in the present work, will not be confined within its narrow positivistic implications. Rather its deeper epistemological meaning is identified through a certain set of logical justifications. It is evident that the complexity of this structure excludes any feasibility of its comprehensive and exhaustive representation and raises the question of the boundaries to which a scholarship that explores it should go. In the present work these limits will be the boundary between what is identified as purely legal principles and those concepts that would have some element of extra-legal connotation. In other words, the present work will aim to reach the utmost concepts of a legal nature that form the most general and abstract basis of the justifications of the norms related to damages for non-pecuniary losses. It will stop at the point where these principles will need to be explained by ideas bearing sociological, ethical, ontological or other extra-judicial meaning.

This does not mean that contract law cannot be justified from ethical, economic, culturological or any other extra-judicial perspective. Such legal analyses are indeed possible and some of them are rather interesting.⁴⁰ They are also justifications of the basic legal principles that are derived from the law as a social phenomenon, but their place within the chain of reasoning is different. Such justifications are derived from the intermediate legal ideas which are to be found between the basic legal principles and the more abstract ethical, economic, culturological or other extrajudicial justifications. Hence morality is not an alternative justification or explanation of the law. It is merely a source of reasons that provides meaning to legal principles, and it is so distantly related to them that it is not considered to be a part of the realm of the legal knowledge anymore. It derives its justificatory power on the basis of a moral theory.

Most legal scholars, in all probability unwittingly, dismiss the justifications which go beyond the most basic or fundamental legal principles because they would think that such type of research does not have legal nature. The reason for their understanding is not to be sought in the impossibility of morality to provide a good explanation of the law. It might certainly do so, but such a justification needs to be seen not as a substitution of the purely legal reasoning that is the primary and inescapable perspective from which legal scholarships should start usually. Morality is their continuation on another epistemological level, where the chain of reasoning and justifications becomes sufficiently distant to the purely legal justifications from which they were derived, that beyond that point they are considered to be of another, extra-judicial nature.

Thus, if the ethical explanation is not derived from the inductive chain of reasoning commencing from the basic legal principles and thence following the inevitable logical chain to the more abstract ethical reasoning, it cannot provide any

⁴⁰ cf. eg. Smith, S., 2004. *Contract Theory*. 1st ed. Oxford: Oxford University Press.

satisfactory or complete justification of the law. Hence it will never be sufficient if it is merely asserted that all damages for non-pecuniary losses should be recoverable because it is just and fair to be so. In order to be able to make such an argument, it is necessary to identify all intermediate justifications that exist between the initial legal concept and these final extra-legal general ideas. The present work will aim to provide exactly that line of argumentation, starting from the simple legal principles that are concealed in the law as a fact and will continue to explore the subsequent, inductively derived more abstract justifications that stand above them, but it will stop just before those justifications become so distantly related to the initial legal concepts that it will no longer be possible to qualify them as bearing any legal connotation at all.

Seen from such a perspective, where the justification of the basic legal principles is understood as the reasoning that stands behind them, it is incorrect to qualify this justification as being good or bad. As the scholarly task of deconstructing this multifaceted line of reasoning is purely epistemological by its nature and has no moral or ethical dimensions at all, its successful accomplishment will always be a matter of the possibility of identifying the accurate general legal concepts, which provide meaning and sense to the more specific basic legal ideas that are to be initially derived from the law. This reasoning however might lead to one important contradiction – if the starting position of such a scholarship is the law as it exists as a social or institutional phenomenon, and if, from this basis, it is possible to reconstruct an ideal logically comprehensive system of reasoning that can justify all its aspects, this would mean that the law itself, as being on the bottom of such a system, is to be considered flawless. Such a conclusion would not be correct. The way of reasoning that is adopted in the present work is not engaged with the existing law, it merely uses it as a starting point for its discourse, for inevitably there is nothing more, as a fact or social phenomenon, from which an epistemological approach towards that law can be commenced. The law cannot be derived from anything else apart from its positivistic existence.

(c) Reconstruction

The conceptual picture of the law derived through its gradual deconstruction into a general inductive theory should not exhibit the flaws that might be discovered in the specific legal ideas or in the law as a social phenomenon on which the abstract conceptual model is based. In other words, although established on imperfect foundations, the merits of the purported general justification of the law as a fact could represent a flawless, systematic and complete picture of the epistemological perception of the purported legal model. This is possible because of the nature of the justifications that are employed and the logical connection that exists between them. Each basic concept is justified on numerous, more abstract principles, whose further relationship with each other determines the meaning of the purported abstract epistemological model. On the foundations of the basic legal concepts, a whole network of interrelated rationales can be established which aim to provide a complex network of interconnected principles that ought to stand above each concept which they aim to justify. Thus, each further level of abstraction, being based on a logically dependent and correlated system of principles, should tend to exclude those paralogisms that would be in contradiction with the other ideas that form the setting of the whole system.

Once this complex network of legal reasoning is established, the converse process of reconstruction of the positive law might be commenced. This will be achieved through a deductive gradual de-conceptualisation aiming to transpose the

most abstract and general principles, which have already been identified, into specific legal ideas with a lesser level of abstraction. In other words, such a reconstructive exercise will lead to a representation of the law on the same conceptual level from which it started at the outset. This deductive reconstruction would be based on the logical connections that naturally flow from more abstract and general principles into those containing a greater level of concreteness and specificity. Now, as the system is described to have numerous interrelations between its elements, this path of deductive reconstruction would not be necessarily identical with the initial one, through which those most abstract principles have been reached. As the deductive thinking provides better opportunities for identifying the most suitable specific principles deriving from the more general ideas, it will rectify flaws that may exist in the lower levels of this system. This deductive reconstruction of the law as a social phenomenon represents the prescriptive account⁴¹ which a legal analysis might extend to, should it aim to have certain social implications beyond its pure epistemological purposes.

Not every piece of legal scholarship aims to provide this sort of prescriptive legal theory. It is merely a useful result that can be deduced from the general justification of the law in its most abstract quiddity, or a subsequent step of such a research project. But this logical subordination in which the general conceptual model is to be found between the law as an existing normative system and as a possible regulative basis does not undermine the epistemological supremacy of the abstract legal theory on damages for non-pecuniary losses. This model should be the utmost aim of legal scholarship, as it provides a cognitive key that might explain both the existing law and the prescriptive legal model which then might be suggested. It is therefore important, before commencing this epistemological endeavour, to shed some light on its appellation, or the designation by which it might be distinguished from other legal theories or accounts.

The law as a social phenomenon contains the basic ideas on which the logical structure of legal reasoning is revealed. However, the law itself has not remained unchanged over time. Two centuries ago it was not possible to recover damages for non-pecuniary losses at all. Later this principle was relaxed, and certain exceptions were introduced. Therefore, the historical moment from which the law as a fact is explored would seem to be an important factor that will determine the contents of the lower levels of the proposed explanatory network of legal reasoning. It will not, however, have any influence on the most abstract and general principles that would be on the highest levels of such a structure. They are not subject to any change in relation to particular religious, economic, moral or any other extra-legal criteria. The reason for this is related to the explanatory power of the principles that are to be inferred from these lower levels of the proposed explanatory network. Being able to convey the inherent legal reasoning that can explain a particular less abstract legal principle, they can also exclude from it any unnecessary connotation, related to its concreteness or specificity. In other words, the invariability of these principles is due to their great level of abstractness in which all particular religious, economic or moral considerations associated with the narrow confines of the times in which they were conceived, are removed. The unnecessary connotations appear to be those that are needed for explanation of principles of lower systematic level, while the abstract legal principles are capable of preserving their purely legal meaning only, transmitting it to a higher level of abstraction. They would not take into consideration any temporary political or cultural turmoils in which the society, at the moment when the particular legal order is explored, might be. Therefore, while today it could be easier to construct the system of legal justifications, as the current law has developed numerous basic rules from

⁴¹ For alternative explanations about the nature of the prescriptive account *cf. eg.* Beever, A. and Rickett, C., 2005. Interpretive Legal Theory and the Academic Lawyer. *The Modern Law Review*, 68, at 320.

which the present analysis might be commenced, the result that would be reached should not be susceptible to any historic distortions. The analysis will not be based on an historic account⁴² that should only aim to compare the law as a fact in two different temporal moments, without trying to provide any justification of its principles in any of them.

It is necessary that the system of the law as a fact is taken in its entirety in a given moment in time. It will not be possible to select a specific number of legal ideas from a certain stage of the development of the law, and then add others from a later period aiming to identify a particular principle that can explain all of them. The explanatory power of the justifications that are sought here is related to their ability to interrelate to each other in a complex interconnected system of legal reasoning that cannot be identified if it is not considered in its entirety. Hence the historic account of law should be approached carefully. It can only be successful in two possible approaches: if the law as a fact is compared from two different historic moments or if it is taken as it is in a specific historic moment and the reasoning that justifies its principles is sought.⁴³ A similar understanding might be applied to comparative accounts: they could only be successful if the system of the selected legal order is taken in its entirety.

A pursuit of an exhaustive and comprehensive account of the regulation of non-pecuniary losses would inevitably include such historic and comparative accounts. If they are explored with the requisite completeness and meticulousness so that they are able to capture the law as a fact in its selected temporal or political boundaries entirely, this would bring certain epistemological and scholarly results. The aims of the present work, however, are more limited. From a historic perspective, it will not explore cases that should not be considered to form part of contemporary English law on the recovery of damages for non-pecuniary losses. Similarly, isolated norms from foreign legal systems would represent a fragmentary and incomplete picture of the indigenous law and no further conclusions about the reasoning that stands behind these norms would be derivable. This leaves the epistemological boundaries of the present work beyond any historic and comparative accounts.

Similarly, the description of English law will not be its main focus either. Although the examination of the law as a social phenomenon might represent a sufficiently challenging task in itself, the present work will not limit its epistemological boundaries to the mere description of the norms that can be derived from the legal sources. Its main object of description will be the complex network of legal reasoning that stands behind them and which can provide a comprehensive and exhaustive justification of them. Such a task, that some other authors would broadly qualify as an interpretation,⁴⁴ justification⁴⁵ or explanation of the law cannot be considered to represent any of these popular designations. This is partly due to their already established connotations to which the present approach of understanding and exploring the law might be fairly alien. Furthermore, a single label could hardly encompass the sophisticated and peculiar epistemological task that is being pursued here. Although this methodological model, which can be considered to be *sui generis*, might

⁴² About the historic account *cf.* eg. Smith, *Contract Theory*, *op. cit.* at 4 *et. seq.*

⁴³ Similar conclusion, but based on different reasoning in Beever and Rickett, *op. cit.*, at 324.

⁴⁴ An example of such understanding might be found in Nolan, D. and A. Robertson (eds.), 2012. *Rights and Private Law*, Oxford and Portland, Oregon: Hart Publishing, at 112, Beever, A., 2007. *Rediscovering the Law of Negligence*. Oxford and Portland, Oregon: Hart Publishing, at 21 and in Winterton, David, 2015. *Money Awards in Contract Law*. Oxford and Portland, Oregon: Hart Publishing, at 16-20.

⁴⁵ Webb, Charlie, 2016. *Reason and restitution*. 1st ed. Oxford: Oxford University Press, at 16.

be generally applicable to any legal analysis, it has been conceived and reproduced within the law on the recovery of damages for non-pecuniary losses. Its structure and interrelated networks of reasoning represent a specific private law model, which aims to provide a unique perspective of the law and the manner in which it might be explained. This conceptual model aims to have its own epistemological merits which are not dependent on the ever-changing system of the law as a fact and which will provide a more universal and general answer to the problems that it aims to address.

2. Contractual relationship before breach

Introduction to Chapter Two

The contractual subject matter⁴⁶ that the promisor is obligated to perform is the core element of the agreement.⁴⁷ It defines the scope and the extent of his duties. If it is viewed from the promisee's perspective, it represents the benefit that he will receive as a result of the performance. In cases of breach, the non-delivery of the contractual subject matter may cause him a certain harm.⁴⁸ There is a close correlation⁴⁹ between the losses following from non-performance and the subject matter of the agreement. A thorough examination of the nature of non-pecuniary losses would presuppose a study of two preliminary questions – about the contents of the contractual relationship at the time of its formation and about the connection that exists between the contractual subject matter and the losses. These two questions are examined consecutively in the two main chapters of the present work.

The legal literature which studies non-pecuniary losses is concerned exclusively with their recoverability. This follows the approach of the courts where more theoretic or abstract examination of the nature or particular features of these harms would be inconsistent with the practical tasks that are pursued when a dispute has to be resolved. No authors have attempted to describe the contents or the features of contractual relationships where non-pecuniary losses could be caused. The gaps that might be identified in the legal literature can be classified in two main groups. The first one is related to the factual or legal circumstances in which non-pecuniary losses could be caused. This includes lack of works exploring the contents and the elements of the agreement from which these harms originate. The second major gap is connected to the distinction between pecuniary and non-pecuniary losses. There are no attempts in English legal literature for identification of the features that differentiate these two types of harms at all. Despite that the lawyers have always been aware of the boundary between these types of harms, no authors have analysed the possible grounds on which such a distinction was drawn.

The present chapter addresses all of these gaps. The main research question that it answers is about the origin of non-pecuniary losses. This core query could be divided into few additional questions which are explored in this chapter. The first one examines the distinction between pecuniary and non-pecuniary losses. It enquires into the suitability of the principles of differentiation between these two types of harms. It aims to understand why certain losses, like mental distress or fright, are considered to be of non-pecuniary nature. The second additional question studies the particular features of the contractual relationship that could support the presence of non-pecuniary harms in case of a breach. The purpose of this enquiry is to identify certain factual or legal circumstances that define the origin of these losses. The last additional question that is answered in this chapter is related to the importance of the contractual interest. It is suggested that its newly proposed element – the contractual aim that the promisee pursues with the agreement – is the only

⁴⁶ For more details about the subject matter, *cf.* Peel, E., *op. cit.*, para 06-028.

⁴⁷ The terms 'agreement' and 'contract' are used interchangeably in this work. Other authors point out some differences between them – *cf. e.g. Chitty on contracts, op. cit.*, para 1-021.

⁴⁸ For cases where the non-performance does not lead to losses, *cf.* chapter 3, section C, subsection b, part iii.

⁴⁹ This correlation is examined in more details in the present chapter, section C, subsection a.

principle that could provide a suitable and workable criterion for distinction between pecuniary and non-pecuniary losses. The present chapter aims to explain how this concept works and what the consequences of its application with regard to the origins of the losses are.

This chapter comprises of three sections. The first one is about the distinction between pecuniary and non-pecuniary losses. It examines possible criteria that can be adopted for differentiation between these two types of harms. It is argued that all feasible principles which could be derived from the legal literature or the leading cases are unable to support such a distinction. It is therefore proposed that the only criterion which can do so is the nature of the promisee's contractual interest. The second section explores the cases where such non-pecuniary interest exists. This would be in all cases where the aim which the promisee pursues with the agreement leads to something else apart from a mere increase of his patrimonial wealth. The last section studies the promisee's non-pecuniary contractual interest. It demonstrates its importance with regard to the type of losses that would be inflicted. It considers also the relationship between the contractual aim and other elements of the agreement. The objective of this chapter is to represent a new understanding of the elements of the contract and their importance with regard to the consequences of the non-performance, including the type of losses which are caused.

A. Distinguishing pecuniary and non-pecuniary losses

Introduction to section A

German⁵⁰ and French law⁵¹ establish a general division of losses into two main groups: pecuniary and non-pecuniary ones. This distinction is alien to English law. In some cases in England it is accepted that the promisee might suffer losses of non-pecuniary nature like physical inconvenience and discomfort,⁵² pain, anguish and loss of amenities,⁵³ mental distress,⁵⁴ or social discredit.⁵⁵ The legal scholarship, when studying losses, examines the rules applicable to pecuniary losses at length and then includes short sections about non-pecuniary harms. Even the most authoritative textbooks on English contract law do not contain a separate subsection where non-pecuniary harms are explored as a single category which is equal to significance to the pecuniary losses. Instead, after detailed examination of the questions related to pecuniary losses, some of the most prominent forms of non-pecuniary losses are exhibited⁵⁶ or compensation for non-pecuniary losses is mentioned as a particular restriction on recovery of damages along with costs.⁵⁷ Thus, English legal scholarship does not have a general theory of what defines the category of non-pecuniary losses and there have been no thoughtful attempts to provide a clearer distinction between these and other sorts of harms. English contract law has

⁵⁰ Markesinis, B., Unberath, H. and Johnston, A., 2006. *The German Law of Contract*. 2nd ed. Oxford and Portland, Oregon: Hart Publishing, at 483.

⁵¹ Rowan, Solène, 2012, *op. cit.*, at 125.

⁵² E.g. *Burton v. Pinkerton* (1867) L. R. 2 Ex. 340.

⁵³ E. g. *Cox v. Philips Industries* (1976) 1 W. L. R. 638.

⁵⁴ E. g. *Hamlin v. G. N. Ry* (1856) 1 H. & N. 408.

⁵⁵ E. g. *Johnson v. Unisys Ltd* [2003] 1 A. C. 518.

⁵⁶ Anson, *op. cit.*, at 566-570, Peel, E., *op. cit.*, para 20-082 *et. seq.* where under the rubric of non-pecuniary losses two subsections explore mental distress and loss of reputation only.

⁵⁷ Chitty, *op. cit.*, at para 26-140 *et. seq.*

been primarily concerned with the recovery of some of the most typical instantiations of non-pecuniary losses rather than trying to establish a general principle by which they could be distinguished from the other consequences of breach. Identifying such a principle might, however, help addressing the complex and multifaceted problem of the nature of non-pecuniary losses and the legal consequences that follow where such harms are caused.

Most authors⁵⁸ recognise the specific limitations that exist in relation to the recoverability of some individual instances of non-pecuniary losses. In the legal literature there are no particular attempts at establishing a general distinction between pecuniary and non-pecuniary losses. This might be due to the perception that the most typical instantiations of non-pecuniary losses are sufficiently differentiable from the other consequences of breach. Nonetheless it appears to be clear that, for example, fright and nervous breakdown are indisputable examples of non-pecuniary losses. However, it is less clear why this is so. Besides, there are additional examples of what might be considered non-pecuniary losses where the matter is less clear cut. In such cases the courts might fail to acknowledge the infliction of non-pecuniary losses at all. Depending on the criterion by which the distinction between pecuniary and non-pecuniary losses is drawn, this approach might change significantly the scope of losses that can be recovered. Thus, the contractual subject matter might be purely tangible from the perspective of the promisor, but it may have sentimental or other emotional value to the promisee. This could be in cases of burial services, photographing or transportation where the performance of the agreements consists of providing services offered on professional basis and sold at a standard price, but the contractual benefit has significant value to the promisee which is not comparable to that price at all.⁵⁹

There might be many characteristics of non-pecuniary losses which are not shared with the other harms inflicted in cases of breach. Thus, it could be argued that the intangibility of non-pecuniary losses is a specific feature that is not to be found in pecuniary harms. In response, it might be objected that although this is arguably a common feature of all non-pecuniary losses, it is a consequence of their non-pecuniary nature rather than a reason for this. The purposes of the present section are not related to discovery of such differentiating features, for they cannot explain why non-pecuniary losses are caused only in certain contracts. In other words, the principles of differentiation of pecuniary and non-pecuniary losses should not be related to their distinctive characteristics, but to their origin. This means that an identification of those types of contractual relationship where non-pecuniary losses might be inflicted is needed. This approach is closely related to the methodology adopted in the thesis. An examination of the origin of non-pecuniary losses is to be preferred to a mere description of their apparent characteristics. Then, on the basis of the outcome of this study, an analysis of their features should follow.

The present section is divided into three subsections. As suggested in the introduction, the first commences its analysis from the present law. Taking its lead from the cases, it identifies a common principle by which a distinction between pecuniary and non-pecuniary losses could be drawn. Although it does not aim to provide a comprehensive analysis of the nature of non-pecuniary losses, as this is conducted in the third chapter, it nevertheless represents a closer textual analysis of the leading cases where non-pecuniary losses were identified. Based on the conclusions drawn in the first

⁵⁸ *Ibid.*

⁵⁹ *E.g. Spiegel v Evergreen Cemetery Co.*, 117 N.J.L. 90, 186 A. 385 (1937), *Ross v Forest Lawn Memorial*, 153 Cal. App. 3d 988, 203 Cal. Rptr. 468 (1984).

subsection, the second subsection provides a more analytical discussion of the possible criteria by which it is possible to distinguish pecuniary and non-pecuniary losses. It claims that neither the nature of the contractual subject matter nor the possibility of its market evaluation provides a plausible criterion for this differentiation. The third subsection explores the feasibility of drawing a distinction by reference to what the present work refers to as contractual interest of the promisee. Its purpose is to establish that the contractual interest itself is the only suitable criterion on which a consistent general differentiation between pecuniary and non-pecuniary losses, applicable to all types of contracts, can be drawn.

(a) Principles of distinguishing pecuniary and non-pecuniary losses in English law

Introduction to subsection a

Judges look into contractual relationship after its breach. Their analysis is directed to the main practical purpose of the proceedings – to decide if the claimant's plea will be allowed or not. In contrast to this, the present chapter aims to analyse the agreement at the time of its formation and to identify those contractual relationships where non-pecuniary losses could be caused. Due to these different epistemological and practical aims the contents of the judgments has a very limited use in the present analysis. There are neither cases where the judges draw a distinction between pecuniary and non-pecuniary losses, nor do they compare these types of harms or any of their particular instantiations directly. Instead, they analyse the law in view of a possible recovery of damages for such losses. Despite that, the judgments still contain certain indications that could provide a useful starting point from which the study of the origin and the distinction between pecuniary and non-pecuniary losses can commence.

The present subsection is divided into four parts. They explore the way in which the most prominent cases comprehend the origins of non-pecuniary losses and the manner in which these judicial perceptions were reflected in the legal literature afterwards. The first part of this subsection explains the constraints of the judicial perspectives on this issue. The second part continues with an analysis of these agreements. It aims to identify the elements that could be used potentially as a criterion for differentiation of pecuniary and non-pecuniary losses. The third part looks into the particular features of these losses. In contrast to the previous part which examines the particularities of the agreements where the harms were caused, the purpose of this part is to explore the origin of these losses by looking into some of their distinctive features and to identify what causes them. The last part explores possible principles on which the sought differentiation between pecuniary and non-pecuniary losses has been perceived in the legal literature and concludes that none should be regarded as a plausible criterion for this distinction.

(i) Distinguishing pecuniary and non-pecuniary losses in the context of their recoverability

The courts have not attempted to identify criteria for differentiating pecuniary and non-pecuniary losses. Their approach has instead been to analyse individual cases on their facts, examining the recovery of such losses in the particular circumstances of each contract. Despite that the approach adopted by the courts might provide an initial direction of the origin of non-pecuniary harms. The judgments identify certain types of losses as non-pecuniary – disappointment, injured feelings, vexation, frustration, emotional or mental distress. Regardless of the question about the compensation of these

harms, they all should have at least one common principle or feature that supports their affiliation to the category of non-pecuniary losses, and it is possible that this might be identified by a careful textual analysis of the leading judgments. Along with arguments about the recovery of damages for such type of losses, these cases contain descriptions of the contractual relationships whose breach incurred these harms. These judgments also mention some features of these losses which are not necessarily attributable to their recoverability but might be related to their non-pecuniary essence.

Two early cases can illustrate this approach. In *Hamlin v The Great Northern Railway Company*⁶⁰ the promisee bought a railway ticket from King's Cross Station in London to Hull. As there was no direct service in these times, he was supposed to change trains at Grimsby from where he would have been able to continue his onward journey to his final destination. The promisor did not provide the agreed interchange. There was no alternative option for the promisee's transportation to Hull that night and he was forced to stay in Grimsby. He incurred some expenses for lodging and the next morning he had to buy a new ticket to Hull. As a result of the contractual breach, the promisee was unable to keep business appointments in Hull and elsewhere. It was decided that the losses which might have occurred as a result of these missed or delayed business opportunities were too remote and therefore irrecoverable. The damages that were incurred for the expenses for the sleeping arrangements and the additional railway ticket were to be compensated in full. It was also added that apart from 'contract affecting the person ... the inconvenience or injury to the feelings of the plaintiff cannot be taken into consideration in assessing the damage'⁶¹

The facts of *Hobbs* were very similar. The promisee was unable to reach his final destination as a result of a contractual breach and along with his family, he was forced to walk to his house. It is further said in *Hobbs* that *Hamlin* 'did not decide that personal inconvenience, however serious, was not to be taken into account as a subject matter of damage in a breach of contract of a carrier to convey a person to a particular destination'.⁶² It was also added that 'there is no authority that personal inconvenience, where it is sufficiently serious, should not be the subject of damages to be recovered in an action of this kind'.⁶³ It could be therefore concluded that, while in *Hobbs* certain non-pecuniary losses were caused, although not all of them were recoverable, in *Hamlin* no such type of losses were inflicted. A similar conclusion was expressed by Blackburn J: 'In *Hamlin v. Great Northern Ry. Co.* there was no inconvenience at all. The plaintiff was going to Hull; he was obliged to stop at Grimsby for the night and went on to Hull the next day. What he sought in the action was to recover damages for the loss of his appointments which he had with customers. That was considered to be too remote, and it was held he was only entitled to 5 s., though I must say I do not know how that amount was arrived at. The inconvenience he did suffer in sleeping at Grimsby instead of Hull seems really to be nothing, and there was no substantial ground on which he could have recovered'.⁶⁴

Although these two cases aim to assess the damages payable following breach, they still provide valuable information about the origin of the losses too. The parties were placed in very similar circumstances, but non-pecuniary losses were inflicted only where the promisee was unable to find suitable sleeping arrangements and, as a result of this, he and his

⁶⁰ 156 E.R. 1261.

⁶¹ *Op. cit.*, at 410.

⁶² As per Cockburn C.J., *op. cit.*, at 117.

⁶³ *Ibid.*

⁶⁴ As per Blackburn, J., *op. cit.*, at 120-21.

family were forced to embark on a long walk to their house in the middle of a drizzly and cold night. In the other case it was decided that, since the promisee arranged appropriate overnight accommodation, no non-pecuniary losses were caused to him. The judgment in *Hobbs* states that the difference in the factual circumstances supports a conclusion that in *Hamlin* no inconvenience was suffered. It might then be further thought that, in view of the particular facts of these cases, the inconvenience is the principle which caused the suffering of non-pecuniary losses.

There are two difficulties arising from this assumption. On the one hand, it might be rather difficult to recognise the circumstances in which inconvenience is caused and its implications on the promisee. It is not entirely certain that having to make alternative sleeping arrangements causes no inconvenience at all, as was averred in *Hobbs*. In other words, it seems that there is a certain way in which the notion of inconvenience must be construed, but it cannot be identified by a mere comparison between these two cases only. On the other hand, if the origins of the non-pecuniary losses in these two cases were related to the inconvenience that was caused, it still does not mean that this is a general principle that could be used for distinguishing pecuniary and non-pecuniary losses in all other cases. Indeed, the inconvenience might be just a specific manifestation of a more general principle which could be identified if other cases are explored. These are the aims of the following two parts. They look into this issue from two separate perspectives. The first one is very similar to the examination adopted in the present part. It compares the type of contractual relationship where non-pecuniary losses were caused in order to determine if they contain some similar elements whose presence determines the types of losses suffered in case of breach. The second one explores if the authorities identify some common features of losses which might define their origin.

(ii) Particular types of contracts where non-pecuniary losses were identified

The position of English law is that damages for non-pecuniary losses are recoverable only if they are caused in two particular types of contracts. The first one⁶⁵ is related to the nature of the subject matter of the agreement and will be examined in this part of the present subsection. The purpose of the following analysis is to establish if there are certain types of contracts in which non-pecuniary losses are caused invariably. If that is so, it might be possible that a specific pattern in the structure of these contracts is identified, which in turn could lead to discovery of the principle for distinction between pecuniary and non-pecuniary losses. As it has been suggested previously,⁶⁶ the law is not directly concerned with the origin of the harms. Instead, it examines the circumstances in which damages could be awarded. Despite that, the analysis of the cases where such awards were made will provide an opportunity for identification of certain features of the agreement whose presence presupposes the infliction of non-pecuniary losses. Hence, it might be possible that the origin of these harms is to be found in the specific subject matter of the contract. On this basis, a more general conclusion about the differentiation between pecuniary and non-pecuniary losses might be found.

⁶⁵ The second one is related to particular features of the losses and it is a subject of a more detailed examination in the present subsection, part *iii*.

⁶⁶ *cf.* the present subsection, part *i*.

From *Jarvis v. Swans Tours Ltd*⁶⁷ it could be inferred that the non-pecuniary losses were related directly to the want of the promised 'invigorating and amusing holiday'.⁶⁸ The contractual breach resulted in the promisee's expectations being largely unfulfilled and causing him 'disappointment and distress at the loss of the entertainment and facilities for enjoyment which he had been promised'.⁶⁹ The judges did not make any distinction with regard to the origin of the different forms of losses, but a careful analysis of the wording used by them could point towards the direction in which such a differentiation might be conceived. It could be supposed that the non-pecuniary losses derived from the nature of the promised contractual result which the claimant was denied – a pleasurable winter holiday. None of the judges makes a direct reference to the source of the non-pecuniary losses, but from their qualifications about the nature of the harms that were caused as a result of the breach it could be thought that these losses are consequent on the intangible, immaterial nature of the promised contractual result. Thus, the distinction between pecuniary and non-pecuniary losses could be sought in the effect that the agreed contractual result would have on the promisee. If it affects his intangible or emotional private sphere, then this is the source from which the non-pecuniary losses might be distinguished.

This could give the impression that the difference between pecuniary and non-pecuniary losses can be established by reference to the nature of the promised contractual result – the particular performance that the promisor has agreed to provide to the other party.⁷⁰ Such an assumption would, however, be dubious. This principle is unable to provide a suitable criterion that might be used for differentiation between these two types of losses unequivocally in all cases. In *Jarvis* the non-performance caused both pecuniary and non-pecuniary losses. But the contract itself had a single subject matter – providing a winter holiday. The promisee received a service with inferior quality, which led to infliction of financial losses to him amounting to the difference in the price between the promised and actually delivered service. Nonetheless the non-performance of the same contractual subject matter led to infliction of non-pecuniary losses too. This raises a question about the causal relationship between the stipulated contractual result and the nature of the losses caused by the breach. It is apparent that if the same subject matter can cause both pecuniary and non-pecuniary losses, then it cannot be used as a criterion by which these two types of harms could be distinguished.

In *Ruxley Electronics and Construction Ltd. v Forsyth*.⁷¹ Lord Bridge of Harwich reiterated the understanding that the origin of the losses is to be sought in the lack of the promised subject matter: 'damages for breach of contract must reflect, as accurately as the circumstances allow, the loss which the claimant has sustained because he did not get what he bargained for.'⁷² He also acknowledged that the parties would not necessarily have a purely economic interest in the contract and that the promisee might be dissatisfied in cases where the performance is of equal financial value to what was initially promised, but does not comply with the agreed particularities and properties.⁷³ From the short speech delivered by Lord Bridge of Harwich where he discussed mostly other issues in the case, it might be suggested, so far the distinction between pecuniary and non-pecuniary losses is concerned, that the inability of the contractual performance

⁶⁷ [1973] Q. B. 233.

⁶⁸ As per Edmund Davies L.J., at 239.

⁶⁹ As per the summary of the case at 233.

⁷⁰ This is further discussed in the chapter 3, section A subsection a, part i.

⁷¹ [1996] A. C. 344.

⁷² *Ruxley*, *op. cit.*, at 353.

⁷³ At 353.

to contribute to the promisee's 'amenity, convenience or aesthetic satisfaction'⁷⁴ is the source of the non-pecuniary losses.

Lord Mustill's speech also provides an opportunity for establishing a principle on which the distinction between pecuniary and non-pecuniary losses could be explained. He rejects the proposition that the cost of reinstatement or the depreciation in value are the two alternative measures that can reflect the loss suffered by the breach.⁷⁵ His position is that '[t]here are not two alternative measures of damage, at opposite poles, but only one; namely, the loss truly suffered by the promisee'.⁷⁶ The origin of the non-pecuniary losses is to be sought in the consumer surplus that the contractual subject matter aims to provide. Similarly to all other judges in *Ruxley* who examine the recoverability of the damages deriving from the lack of amenity, convenience or aesthetic satisfaction, Lord Mustill is not directly engaged in explaining the principal basis on which these could be distinguished from financial losses, but he recognises the additional value that the subject matter purports to provide to the promisee stating that 'it represents a personal, subjective and non-monetary gain'.⁷⁷

The case which provides the most extensive analysis of the recoverability of damages for non-pecuniary losses in English law is *Farley v Skinner* – it was first at trial before the High Court,⁷⁸ then there were two appeals before the Court of Appeal⁷⁹ and one appeal before the House of Lords.⁸⁰ From the perspective of the distinction between pecuniary and non-pecuniary losses the importance of this case is not merely related to the extensive and detailed arguments provided in the five speeches delivered by the judges in the Court of Appeal⁸¹ and the four speeches from the House of Lords.⁸² As the previous cases, *Farley* does not engage in direct discussions on the origin of these harms. It contains a comprehensive overview of the circumstances in which damages for such losses are recoverable.

Nonetheless certain clues can be identified in the judgments which provide a useful starting point for examining the origin of non-pecuniary losses. The structure of the speech delivered by Stuart-Smith L.J.⁸³ suggests that there are two alternative conditions for recovery of non-pecuniary losses. The first one comprises the occasions where physical inconvenience or discomfort were caused. The second condition is related to the properties of the contractual subject matter. Stuart-Smith L.J.'s opinion is that the contract in *Farley* contained 'an obligation to exercise reasonable care and skill in giving information or advice',⁸⁴ rather than providing some pleasurable result. Aside from the implausibility of such

⁷⁴ *Ibid.*

⁷⁵ At 360.

⁷⁶ *Ibid.*

⁷⁷ At 360-61.

⁷⁸ This is not reported, but there is sufficient information about the proceedings in the subsequent appeals, which are reported.

⁷⁹ 1999 WL 1048346 and [2000] P.N.L.R. 441

⁸⁰ [2002] 2 A. C. 732.

⁸¹ Two were delivered by Lord Justice Judge and Lady Justice Hale in the first proceeding before the Court of Appeal where no agreement was reached, but the decision was handed to the parties and then, at the second appeal before the same court three more speeches were delivered by Stuart-Smith, Mummery and Clarke L.JJ.

⁸² Delivered by Lord Steyn, Lord Clyde, Lord Hutton and Lord Scott of Foscote.

⁸³ [2000] P.N.L.R. at 442.

⁸⁴ At 453.

a division of subject matters in general,⁸⁵ another objection can also be raised. Stuart-Smith L.J.'s understanding is that there are certain types of contracts, like the one in *Farley*, where, despite any particular stipulation made by the parties, no non-pecuniary losses could be caused. In other words, if the parties select a specific subject matter, this precludes any possibility of their suffering non-pecuniary losses. Such an understanding cannot be supported. As it is explored in the following subsections, the choice of subject matter does not predefine the possibility of infliction of non-pecuniary losses.⁸⁶ On the contrary, even in these types of contracts, which were identified by Stuart-Smith L.J., both pecuniary and non-pecuniary losses could be caused.

Clarke L.J.⁸⁷ and the majority in the House of Lords adopted a less restrictive approach towards the origins of non-pecuniary losses. Their understanding is close to the position endorsed by Lord Denning M.R. in *Jarvis* where the distinction between pecuniary and non-pecuniary losses is thought to be justifiable on the nature of the contractual object. It is not clear what contractual object should mean, but it could be supposed that it is identical to the notion of contractual subject matter or stipulated result as it is defined in the present work.⁸⁸ In contrast to *Jarvis*, *Farley* accepts a broader understanding of the effects of the promise of a pleasurable amenity which is not required to be the sole object of the contract, but merely an important part of it. Such a stance suggests that a single contractual subject matter might lead to both pecuniary and non-pecuniary losses. This in turn means that the origin of the losses should not be sought in the contractual subject matter at all as it is not a decisive element whose presence would define necessarily the type of harms inflicted in case of breach.

(iii) Particular features of non-pecuniary losses identified in the leading authorities

There might be particular features of non-pecuniary losses that could distinguish them from other harms. Similarly to the cases examined in the preceding part of the present subsection, the courts are not engaged directly with examination of the origins of non-pecuniary losses. Instead, they describe them in a certain way necessary only for the purposes of their recoverability. The aims of the present part of this subsection is to examine if some of these features are specific to non-pecuniary losses and thus could be used for identification of their origin.

The speech delivered by Ralph Gibson L.J. in *Watts v Morrow*⁸⁹ confirmed that it is possible to claim damages for non-pecuniary losses in 'a contract for a holiday or [in] a contract to provide entertainment and enjoyment'.⁹⁰ However, the particular case was not thought to be of such a nature. In relation to the source of the damages in *Watts* it was asserted that 'in the case of the ordinary surveyor's contract, damages are only recoverable for distress caused by physical consequences of the breach of contract'.⁹¹ This conclusion was supported by Bingham L.J. who thought that 'damages

⁸⁵ This is further explored in chapter 3, section A, subsection a, part i where it is argued that all contractual subject matters can be conceived as aiming to provide a certain result only.

⁸⁶ *cf.* the present section, subsection b, part ii.

⁸⁷ At 456-473.

⁸⁸ *cf.* chapter 3, section A, subsection a, part i.

⁸⁹ [1991] 1 W. L. R. 1421.

⁹⁰ At 1440-41.

⁹¹ At 1442.

are ... recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort'.⁹² The manner in which the non-pecuniary losses are perceived in this case is different than *Jarvis*. Here the contract did not aim to provide any particular pleasurable amenity, but the breach caused physical inconvenience to the promisees. This result was considered to be a condition for the recoverability of the non-pecuniary harms that resulted from the breach. The rule established in this case is that damages for non-pecuniary losses are recoverable if they follow from physical inconvenience. This does not mean that such losses are suffered only in these cases – there might be other irrecoverable non-pecuniary harms which are not resulting from physical inconvenience. This case does not provide further opportunities for identification of the circumstances in which this could happen.

The losses examined in the preceding part⁹³ have been identified to be of non-pecuniary even if they do not result from physical inconvenience and discomfort. But there is another, more fundamental difference between them and the harms that were caused in *Watts*. If the losses are related to the contractual subject matter, this could provide some more information about their origin. All of the types of harms we are concerned with are caused as a result of non-delivery of the promised subject matter.⁹⁴ Accordingly if certain contractual subject matter leads to infliction of non-pecuniary losses, as it is claimed in some cases, it might be thought that there is a correlation between the losses and the subject matter of the agreement.⁹⁵ Nevertheless, this line of reasoning cannot be applied to the harms described in *Watts* where the physical inconvenience was a condition for the recoverability of the losses rather than their existence. There might have been other non-pecuniary harms which were not manifested in any tangible or other perceptible form. The requirement of physical inconvenience is merely a particular feature of some non-pecuniary losses that is attributable to their recoverability and does not provide any indication with regard to their origin. The purported perceptibility of the losses in *Watts* aims to distinguish some of the more apparent instantiations of non-pecuniary losses in order to justify their recoverability but does not mean to designate any specific property that distinguishes all non-pecuniary losses from the other types of harms resulting from the breach.

(iv) Distinctions drawn in the legal literature

There are no attempts in English legal literature to explain the differences between pecuniary and non-pecuniary losses. However, the leading contract law texts contain some indications about the factual or legal circumstances in which non-pecuniary harms could be caused. Some authors think that '[c]ontract is primarily concerned with commercial matters and therefore the protection afforded by the law of contract is primarily directed to commercial losses'.⁹⁶ From this statement it might be concluded that, if the contract is not concerned with commercial matters, then other types of losses could be inflicted. The general and concise character of this assertion raises too many questions and is not able to provide a specific criterion on which the differentiation between pecuniary and non-pecuniary losses could be conceived.

⁹² At 1445.

⁹³ *cf.* the present subsection, part *i*.

⁹⁴ For more detailed examination of the relationship between the contractual subject matter and losses, *cf.* chapter 3, section A, subsection *a*, parts *ii* and *iii*.

⁹⁵ For more details about the relationship between the nature of the contractual subject matter and the type of losses *cf.* the present section, subsection *b*, part *ii* and subsection *c*, part *iii*.

⁹⁶ McGregor, *op. cit.*, para 5-015.

It might be rather dubious that a breach of a contract which is not concerned with commercial matters will inevitably lead to non-pecuniary losses only.

None of the leading contract law texts provide any indications about the origins of non-pecuniary losses or the circumstances in which they might be caused. Instead they all are engaged exclusively with the issues of their recoverability. Similarly, other authors who have written specific articles on this topic do not attempt to make any distinction between pecuniary and non-pecuniary losses. There are some concise attempts for explanation of the awards of damages for injured feelings and mental distress, but they do not go beyond the principles of recoverability established in the law.⁹⁷ The typical reviews of the law that are presented in the legal literature are limited to describing the cases where such harms were redressed.⁹⁸

The limited scope of the legal literature on non-pecuniary losses provides a good demonstration of the narrow scholarly purposes that it aims to serve. Its objectives seem to be limited to explanation of the leading authorities by close replications of their argumentation and scope. None of the authors tries to establish where non-pecuniary losses come from, what the circumstances in which they might be caused are, and consequently, why only certain damages for non-pecuniary losses are recoverable. Perhaps these questions might have seemed too obvious to require particular examination. Indeed, it might be assumed that non-pecuniary losses are those harms that cannot be measured in money.⁹⁹ However such a perception has a tautological nature as it merely rephrases the appellation with which these losses are associated. It does not explain in which circumstances they are caused and why they cannot be recalculated in some pecuniary form.

Despite the reluctance of the legal scholarship to look beyond the topics raised in the leading authorities, there is one article¹⁰⁰ which examines the principles that distinguish various types of non-pecuniary losses. It describes two sorts of cases where non-pecuniary losses could be suffered. The first one is where the promisee 'actually contracts for some non-pecuniary benefit (such as enjoyment, peace of mind, freedom from distress or molestation)'.¹⁰¹ In these circumstances the origin of the losses is associated with the nature of the contractual subject matter. Despite the nature of the contractual subject matter, there could be other cases where non-pecuniary losses could be inflicted: '[f]or example, a consumer may not have contracted for any particular non-pecuniary benefit but, as a result of the breach, may nevertheless have suffered some non-pecuniary loss...'¹⁰² These losses are considered to have consequential nature. The inability of the contractual subject matter to define the type of losses is examined in detail in the following subsection.¹⁰³ The authors do not explore the circumstances in which the consequential non-pecuniary losses might be inflicted but the present work provides an account of their origin too.¹⁰⁴

⁹⁷ Dawson, Francis, *op. cit.*, at 235 *et. seq.*

⁹⁸ Macdonald, Elizabeth, 1994., *op. cit.*, at 142 *et. seq.*

⁹⁹ *cf. e.g.* Tettenborn, Andrew, 2003, *op. cit.*, at 95.

¹⁰⁰ McKendrick, Ewan and Katherine Worthington, 2005. *op. cit.*, at 288.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *cf.* the present section, subsection *b*, part *iii*.

¹⁰⁴ *cf.* the present chapter section *C*, subsection *c*, part *iv*.

Conclusion to subsection a

The case law explores non-pecuniary losses only in the context of their recoverability. This approach does not provide an opportunity for a study of their origin or distinctive features. Even a closer look into the instances where such harms were inflicted does not reveal a pattern with regard to the features or the specific characteristics of the agreements. The preoccupation of the law with the recoverability of damages cannot provide an opportunity for identification of a principle that can be used for their distinction from the other harms. This propensity is reflected in the legal literature too. Legal scholars follow the courts in their practical tasks to resolve particular disputes rather than trying to engage in abstract theoretical reflections on the nature of losses. The other possible impediment that could be discovered in the authorities is that they look into the contractual relationship after its breach. Their perspective is limited to the consequences of non-performance rather than identification of some specific features of the contract as they could be found at the time of its formation. The attentiveness of the legal scholarship towards the consequence of the breach makes it more difficult to notice the factual or legal circumstances in which the contractual relationship was created. This in turn limits the prospects for discovering any elements of the agreement which are decisive for the origin of non-pecuniary losses.

Despite the inability of the case law and the legal scholarship to provide some guidance with regard to the origin of these harms, the analysis in the present subsection is not futile. There are some attractive vestiges in the leading cases that could be used as a starting point for examination of non-pecuniary losses. These indications could be divided into two groups. The first one is of a methodological nature and determines the perspective through which the origin of these losses could be approached. The most appropriate manner for examining the factual and legal circumstances in which a particular type of harms is inflicted is to look into the elements of the contractual relationship. This requires a more systematic and exhaustive examination of the structure of the agreement at the time of its formation rather than an exploration of the possible features of non-pecuniary losses at the time of the breach. The second group of indications relates to the specific elements of the contractual relationship that are to be studied. It has been seen that the subject matter is an important feature that is in some way related to the type of harms that may follow breach. This correlation, along with other possible criteria for distinction between pecuniary and non-pecuniary losses, are explored in the following subsection.

(b) Traditional criteria for distinction between pecuniary and non-pecuniary losses

Introduction to subsection b

The cases do not identify a principle that can differentiate pecuniary from non-pecuniary losses. This question is not explored in the legal literature in sufficient depths either. Perhaps it is thought that the distinction is self-evident and not worthy of special studies. Furthermore, the non-pecuniary nature of some harms has not been perceived as controversial. Mental distress, vexation, nervous breakdown and psychiatric illness have always been considered to be indisputable examples of such losses. The aim of this subsection is to establish that such apprehensions are founded on intuition and do not have a scholarly basis. This is achieved by an analysis of possible principles that could identify the non-pecuniary nature of certain harms. It is submitted that none of these principles or features of losses is apposite to determine their

origin or the circumstances in which they might be caused. These traditional understandings are unable to provide a universal criterion which could be used to establish unequivocally the particular contractual relationships where non-pecuniary harms could be inflicted. The research question that is answered in this subsection is whether it is possible to identify concepts or ideas which describe the origins of non-pecuniary losses or provide a workable principle for their differentiation from the other harms.

This subsection comprises five parts. Each examines a distinct criterion that could be perceived as able to differentiate pecuniary from non-pecuniary losses. The first one is about the intangible nature of losses. It explores if the imperceptibility or other similar features of non-pecuniary harms are what distinguishes them from pecuniary harms and may then identify those contractual relationship where such losses could be incurred. The second part looks into the ability of the contractual subject matter to predefine the type of harms inflicted as a result of non-performance. It demonstrates that both pecuniary and non-pecuniary losses could be caused in contractual relationships with identical subject matters and thus proves that this cannot be a principle on which the sought differentiation could be drawn. The next part investigates if the possibility of a market evaluation of the contractual subject matter could determine what types of harms the promisee may suffer. It establishes the lack of connection between the objective price of the promised performance and its non-pecuniary value to the promisee. The fourth part studies the role of the consumer surplus in the contractual relationship. It argues that regardless of its common association with non-pecuniary losses, it is unable to identify any factual or legal circumstances in which they might be incurred. The last part of this subsection considers the contracts whose performance cannot increase the patrimonial wealth of the promisee. It is submitted that there are many agreements that aim to enhance the promisee's financial position but may also cause him to suffer non-pecuniary losses.

(i) Intangible nature of losses

It might be thought that if the losses caused by the breach are intangible, then they are of non-pecuniary nature. This would include all types of harms which have immaterial or incorporeal essence. All other losses that have some form of physical existence should be qualified as having a pecuniary nature. Emotional distress, psychiatric illness and disappointment would be considered as non-pecuniary losses. All of them have intangible manifestation and cannot be perceived physically. On the other hand, defective goods, substandard construction works, and damaged properties are typical examples of pecuniary harms. They have corporeal appearance and can be sensed materially. However, there are other examples which do not fit that neatly in this classification. The missed profit does not have any tangible existence, but it is considered indubitably as an example of a pecuniary loss. On the other hand, the noise caused by aeroplanes flying over the promisee's property and causing him a non-pecuniary losses might be said to be of a tangible nature.¹⁰⁵ The physical inconvenience and discomfort which are necessary requirements for the recoverability of damages for non-pecuniary losses¹⁰⁶ are the most obvious confirmation that the tangibility of the harms cannot define their type.

¹⁰⁵ *Farley*, [2001] UKHL 49, at 739.

¹⁰⁶ *Watts v Morrow* [1991] 1 WLR 1421.

There are other problems if the distinction between pecuniary and non-pecuniary losses is based on their tangibility. This question has two separate dimensions. The first one is about the relationship between the corporeal manifestation of the breach and the physical forms in which the losses occur. It should seek to determine if the fact that the non-performance of the contract has a physical materialisation predetermines the forms in which the losses can occur. The relationship between the harms and the breach is examined separately in this work,¹⁰⁷ but at this point it could be noted that there is no correlation between the physical manifestations of the breach and the losses. The breach might have physical form of instantiation, but it could inflict losses that do not have any tangible existence at all. Thus, as a consequence of a contractual non-performance a limb might be broken. The breach would consist of the physical act that leads to the injury, but the losses will not have any corporeal manifestation. They would include the medical expenses that will be incurred and the missed profits that will not be realised, along with all distress, pain, and vexation suffered as a consequence of the injury. On the hand, the non-performance might have intangible form, but the losses that it would cause could have very disruptive physical existence. If a fence needs to be painted, the promisor's failure to do so will not consist in any action of physical nature. Despite that the losses will have physical existence – the fence will appear undecorated which could deprive the promisee of aesthetic enjoyment or from an opportunity to sell his property at a higher price. Thus, the physical manifestation of the breach cannot determine if the losses will have corporeal existence or not.

Furthermore, the fact that the losses might have corporeal existence or not, cannot determine their type. The examples in the proceeding paragraphs illustrate this point well. Even if the harms have intangible manifestation, they could still be of pecuniary nature. The missed profit resulting from the undecorated fence is the most obvious example, but there would also be other instances where the promisee suffers a medical condition whose treating incurs certain expenses. There are other examples where non-pecuniary harms have intangible materialisation. This includes cases of mental distress, vexation or nervous breakdown. Conversely, some harms will have only physical materialisation, but they could still have non-pecuniary essence. In *Hobbs* the promisee and his family had to undertake a long walk to their house. This had physical existence but inflicted non-pecuniary losses. In other cases, losses which are manifested tangibly, are of financial nature. The destruction of a valuable family portrait will not only deprive the promisee of his ability to enjoy the artistic qualities of the painting but will also deprive him of its market value.

A further distinction between the corporeal manifestation of the harms and some material objects that might be affected by the breach needs to be established too. Such objects are those with regard to which the promised contractual result is rendered – a property for refurbishment,¹⁰⁸ pets that need to be transported to a certain place¹⁰⁹ or a property that needs to be repaired.¹¹⁰ These objects are not identical with the subject matter of the contractual relationship – a construction or renovation works that need to be undertaken or a conveyance to a certain destination. In such cases the physical existence of these objects might be connected erroneously with the tangible materialisation of the losses which could be caused if some of these objects are harmed during the contractual performance. The losses caused by the

¹⁰⁷ cf. chapter 3, section B, subsection a, parts ii-iii.

¹⁰⁸ *Watts v Morrow*, op. cit.

¹⁰⁹ *Newell v Canadian Pacific Airlines Ltd* (1977) 14 OR (2d) 752 (Co Ct).

¹¹⁰ *Earle v Charalambous* [2006] EWCA Civ 1090.

destruction of a valuable family portrait can be associated wrongly with the corporeal existence of the object with respect to which the contractual obligation was undertaken. In *Watts* the stipulated subject matter did not have corporeal nature, but there was a material object with regard to which the contract was formed – a house that the promisees wanted to buy. The breach was associated with the physical existence of this house. The substantial renovations and the great physical inconvenience that the promisees suffered as a result of this led to their losses. Even so, the corporeal nature of the object to which the breach was associated did not predetermine the type of harms that were inflicted. Although the house was a tangible object, the harms that were caused were of non-pecuniary nature.

(ii) Specific nature of the contractual subject matter

The most apparent element of the contractual relationship that might determine the types of losses is its subject matter: the contractual result that the promisor is obligated to deliver to the other party.¹¹¹ The harms result from the lack of the promised contractual benefit and therefore it might be thought that certain categories of losses are caused by the non-provision of specific types of contractual subject matters. If the promisor has agreed to perform a musical, then his breach is highly likely to cause non-pecuniary losses to the other party. Conversely, if the contract is for the sale of goods, the promisee is unlikely to suffer such losses. It could be supposed that if the contractual subject matter provides non-pecuniary benefits to the promisee, then the non-performance would inflict such types of losses too. Although there have been no attempts for an identification of this sort of contractual subject matters, it could be expected that they would encompass all cases where the promisee receives a certain non-pecuniary advantage as a result of the performance.

On this basis, the specific nature of the contractual subject matter would allow us to identify the agreements where non-pecuniary harms could be caused. It is widely accepted both in the academic literature¹¹² and the case law¹¹³ that whenever the ‘major and important’ object of the contract is to provide some sentimental value to the promisee, then the non-pecuniary losses that are suffered as a result of the breach are recoverable. A possible logical assumption from this general rule might be that in all other cases where the minor or the secondary object of the contract is to provide a non-pecuniary benefit to the promisee, the non-performance would still cause non-pecuniary losses to him, but they will not be recoverable. Whenever the contractual subject matter has some sentimental value to the promisee, then he can suffer non-pecuniary losses. The presence of non-pecuniary value in the contractual subject matter would determine the origin of the losses, and the degree of this sentimental value would define their recoverability.

Despite the attractiveness of this approach, it is not a suitable criterion for identifying all cases where non-pecuniary losses could be caused. At least two principle objections can be raised against it. First, it does not provide a sufficiently clear differentiation of all contractual subject matters that can confer some sentimental value to the promisee. The non-provision of some subject matters seems to inflict non-pecuniary harms always. A contract for holidays¹¹⁴ or other similar

¹¹¹ For a more detailed discussion about the nature of the contractual subject matter *cf.* chapter 3, section A, subsection a, part i.

¹¹² *cf. e. g.* Peel, E., *op. cit.*, para 20-088 and Anson, *op. cit.*, at 593 *et. seq.*

¹¹³ Apart from the cases, discussed in the first subsection of the present chapter, *cf. e. g.* *Johnson v. Gore Wood & Co.* [2001] 2 W. L. R., *per* Lord Bingham at 96.

¹¹⁴ *Jackson v Horizon Holidays Ltd* [1975] 1 W.L.R. 1468, *Milner v Carnival Plc* [2010] EWCA Civ 389.

pleasurable amenities¹¹⁵ are unequivocal instances of such cases. There are other less clear instances where it might be rather questionable if the contractual subject matter provides such sentimental benefit to the promisee. In an agreement for a transportation to an airport the promisee can suffer non-pecuniary losses, which could derive from his inability to meet a special person there or to continue its onward journey for an important family occasion. Despite this the covenanted subject matter cannot be considered incontestably as one which confers non-pecuniary value to the promisee. Similarly, an agreement for legal representation¹¹⁶ is not usually associated with this effect, but in cases when a protection against molestation is needed, its non-performance would lead typically to non-pecuniary harms.

The second problem that is encountered if the subject matter of the contract was adopted as a criterion for distinguishing pecuniary and non-pecuniary losses is that it suggests that in all cases with identical subject matters, the type of possible losses should be the same. The understanding that is supported in the present work is that the type and the amount of losses does not depend on the manner of breach.¹¹⁷ This would mean that the consequences of the breach are dependent entirely on the contents of the contract as it is agreed at the time of its formation. In contracts where a standard survey for a property is promised on one occasion the breach caused non-pecuniary losses,¹¹⁸ while on another¹¹⁹ it did not. More compelling examples can also be provided. Non-performance of a contract for delivery of an interior door might be thought to cause non-pecuniary losses only rarely. If the promisee has specific requirements with regard to particular carvings for aesthetic reasons, and the door is not manufactured to the required standard, then non-pecuniary losses may be caused. On the other hand, if such a door is ordered with the purpose of being displayed in a shop for sale, the promisee could hardly justify anything beyond potential financial losses. In such circumstances the contractual subject matter alone cannot be a decisive criterion for the origin of the non-pecuniary losses.

(iii) Impossibility of market valuation of the contractual subject matter

There are certain difficulties when the type of losses is associated with the non-pecuniary benefit that the contractual subject matter might confer to the promisee. It is not clear what a list of conceivable subject matters that provide non-pecuniary value to him will contain. There is no reliable method by which those subject matters could be distinguished and consequently it is impossible to identify the agreements where non-pecuniary losses could be caused. This issue might be addressed if an alternative feature of the contractual subject matter is chosen which is able to provide a clearer indication for the origin of the losses. It might be thought that such principle is the possibility of market valuation of the subject matter. If the contractual benefit does not have a market value or its market assessment does not reflect the value that it has to the promisee, then the non-performance would lead to non-pecuniary losses. The examination of this assumption is divided into two scenarios. The first one encompasses cases where it is not feasible to provide an objective pecuniary assessment of the subject matter and it is explored in the present part of this subsection. The second scenario

¹¹⁵ *Chandle v East African Airways Corp* [1964] E.A. 78.

¹¹⁶ *Heywood v Wellers (A Firm)* [1976] 2 W.L.R. 101.

¹¹⁷ For more details *cf.* chapter 3, section A, subsection a, part ii. For the opposite opinion, *cf.* Veitch, Edward, 1977. Sentimental Damages in Contract. *U. W. Ontario L. Rev.*, 16 at 230.

¹¹⁸ *Watts, op. cit.*

¹¹⁹ *Philips v Ward* [1956] 1 W.L.R. 471.

includes cases where, despite the viability of some monetary valuation of the contractual subject matter, it will not include the true value that it would have for the promisee. It is studied separately in the succeeding part of this subsection.¹²⁰

Some initial examples might illustrate the attractiveness of this criterion. The impossibility of a market valuation of the contractual subject matter might be due to its rarity or uniqueness. There could be certain difficulties if a price to a precious piece of art is placed. Lisa Gherardini's portrait which is exhibited in the Louvre can hardly have any monetary assessment that can truly reflect its invaluable significance for the development of the Renaissance art. Further to that, other contractual subject matters might not have a market price due to their value to a very limited number of people, which would typically include the promisee only or parties associated with him very closely. If he commissions a portrait that aims to capture an important family event, then it may represent no or very little sentimental value to other people. Similarly, if an architectural design for a family house is ordered, it will take into consideration the specific preferences and requirements of the promisee, including with regard to his particular plot of land and the applicable planning regulations, and thus it will rarely have such value to someone else.

These instances demonstrate that in certain cases there are significant difficulties for market valuation of the subject matter. Despite that in any of the above examples it is possible to put a certain price tag on the subject matters even if it might not represent its true non-pecuniary value. In these cases, there is no market that can determine the value of the contractual subject matter fairly and independently of the parties. In most instances the lack of such a market can be determined unquestionably. In the example with the painting commissioned to portray an important family event there will be little or no interest on behalf of any other members of the public apart from those which are closely connected to the occasion and the ones which are depicted there. The invaluable art objects can also be fairly easily identified. Then it could be concluded that although it might be difficult, it is not impossible to find certain contractual subject matters which do not have market value because of their other non-pecuniary importance.

All the same, there is one significant flaw which does not allow to accept this principle as a criterion that can be used for distinguishing pecuniary and non-pecuniary losses. This flaw is not that these subject matters can still be subject to some price evaluation, albeit being imprecise and sometimes arbitrary. On the contrary – this criterion can identify certain contractual subject matters whose market price does not reflect their true sentimental value for the promisee. The problem with this criterion is similar to those that have been identified in the preceding parts of this subsection. Non-pecuniary losses will not be caused inevitably in all cases where the contractual subject matter is of this kind. A family portrait might not be of some special value to the promisee at all. It might be commissioned to adorn the premises of a house with the intention of increasing its attractiveness amongst prospective vendors. On the other hand, the contractual subject matters that cannot be subject to market evaluation do not accommodate other instances where non-pecuniary losses are typically inflicted. This would include all cases where certain pleasurable amenity is provided on a commercial basis to consumers.

¹²⁰ *cf.* the present subsection, part *iv*.

(iv) Presence of consumer surplus

It can be concluded that the uniqueness or the rarity of the contractual subject matter is not related to the potential infliction of non-pecuniary losses. Nonetheless the examples from the previous part contain an important advantage over the other criteria which have already been discussed earlier. The contractual subject matters with limited market valuation have some special subjective value to the promisee. More broadly, these instances are part of a wider group of cases where the subject matter of the contract is considered by the promisee to be of a higher value than the price agreed between the parties. In the economic literature this excess is typically referred to as the consumer surplus.¹²¹ It might be thought that the principle which distinguishes pecuniary from non-pecuniary losses is the presence of this surplus. It could be deemed that the promisee's subjective evaluation of a holiday or family photographs are higher than the agreed contractual price.¹²² In such cases the consumer surplus measures the additional value of the contractual subject matter beyond its market price. It encompasses the pleasure or the utility that the consumer would gain from the contractual performance.

The concept of consumer surplus might be thought to express the additional non-pecuniary subjective value which the contract would confer to the promisee. He values the subject matter of the agreement more highly than the average purchaser of an identical good or service and this greater appreciation represents his consumer surplus.¹²³ In mathematical terms, the consumer surplus is the difference between the price that the promisee is prepared to pay and the one that he actually pays for a certain product or service. The presence of such a difference could be perceived as an indication that the promisee identifies certain non-pecuniary value in the performance and because of it, he is willing to pay more for it than others. Thus, when he buys a train ticket for a trip with the intention of calling at his relatives, he values the non-pecuniary benefits of such a visit more than the price he is obligated to pay to the promisor for the transportation services. Similarly, the promisee values the aesthetic benefits of a certain painting more than the price he will have to pay to the artist who will paint it.

Nevertheless, there might be instances where the promisee is willing to spend more than the usual price for certain products or services not because of their non-pecuniary value to him. In many cases he might discern a good business opportunity which will allow him to make further profits. There could be many reasons why no other persons might be able to identify such opportunities – they may not have the necessary technologies or knowledge for this or additional capital that is needed for realisation of the potential profit. It is not questionable that there is a room for consumer surplus in commercial context too where the parties are looking to enhance their profits rather than their utility.¹²⁴ The market price depends on economic factors and in many cases it might be lower than the value of a good which a company wishes to purchase in view of maximising its profits. In such cases no non-pecuniary losses could be caused, the only possible losses the breach of such a contract might inflict are financial. A company might buy a painting with an expectation of its prospective price increase. A purchaser of a house might be interested not in living in the property, but in its consecutive

¹²¹ cf. e.g. Willing, (1976) Consumer surplus without apology. *American Economic Review* 66 589.

¹²² The same opinion in Harris, D., A. Ogus and J. Phillips, 1979. Contract remedies and the consumer surplus. *Law Quarterly Review*, 95 (6), at 583.

¹²³ Harris, D., A. Ogus and J. Phillips, *op. cit.*, at 582.

¹²⁴ Harris, D., A. Ogus and J. Phillips, *op. cit.*, at 583.

use for commercial purposes. The presence of a consumer surplus is not always an indication of some non-pecuniary value that the promisee expects from the contractual performance.

Conversely, the promisee might attach significant non-pecuniary value to the performance, but he may not be willing to pay more than the average market price for it. In such case there will be no consumer surplus, but the breach would cause non-pecuniary losses. If a wedding photographer is hired, the promisee would value the photographs of the bridal ceremony greatly. However, there is no reason to suggest that he might desire to pay more for them than the price which would be typically charged for identical services. This would be true for all services that are offered in a competitive market where the promisee has unlimited number of sources from where he can procure alternative performance. In these cases, it could be supposed that the average market price would be the upper limit that he would be reasonably willing to spend. This would not be equal to the value that he attaches to his wedding photographs at all. Therefore, the concept of consumer surplus is unable to identify the cases where non-pecuniary harm can be inflicted. There are some agreements where despite the consumer surplus, no such harms are caused, and others, where despite the lack of consumer surplus, significant non-pecuniary losses could be sustained.

(v) Lack of pecuniary enrichment from the performance

Another popular understanding of the distinction between the two types of losses is related to the pecuniary consequences of performance. In cases where the contractual subject matter does not involve an increase in the promisee's net balance sheet position, non-pecuniary losses may be caused. The breach of such contracts would not lead to any worsening of the promisee's patrimonial wealth – neither his assets will be reduced, nor will his liabilities be increased. Such examples would include many consumer contracts providing pure services – visiting a pop concert or arranging a holiday.¹²⁵ In these cases the contractual performance does not add anything to the promisee's assets. Conversely, pecuniary losses could be caused in all other contracts whose performance improves the promisee's pecuniary position from a balance sheet perspective. In these cases, the contractual performance leads to some financial enrichment of the promisee. There could be many examples of such agreements. An agreement for the sale of goods would enhance the patrimonial wealth of the promisee with the resale price of the goods.

The attractiveness of this principle of distinction between pecuniary and non-pecuniary losses is understandable. On the one hand, it addresses many of the deficiencies that the criteria examined in the previous parts of this subsection exhibit. They aim to distinguish certain subject matters whose presence in an agreement would supposedly lead to infliction of non-pecuniary losses in all cases of breach. This approach is not workable as in contracts with identical subject matters different types of losses could be caused. A distinction between pecuniary and non-pecuniary losses based on the financial effect of the performance on the promisee's position might address this deficiency successfully. On the other hand, the financial outcome of the performance seems to reflect the nature of non-pecuniary losses as harms which do not affect the promisee's patrimonial wealth. It derives from the perception that if the performance does not improve

¹²⁵ For more examples and analysis of the effects of the performance of such contracts cf. Webb, Charlie, 2017. 'Performance Damages', in Virgo G. and S. Worthington (eds.) *Commercial remedies: resolving controversies*. Cambridge: Cambridge University Press, at 211 *et. seq.*

his financial position, it could only have some non-pecuniary value to him. If the performance had neither pecuniary nor non-pecuniary value to the promisee, he would have not concluded the contract at all.

Despite these apparent advantages, this principle is not a good criterion for distinguishing cases where non-pecuniary losses could be caused. There are certain contracts where performance does not improve the promisee's financial position but still he cannot suffer any non-pecuniary losses. Thus, a barrister can conclude a contract with a law firm to represent its client in court. In this case the law firm will not be enriched as a result of the service. The representation before the court will not lead to any enhancement of its patrimonial wealth. However, it is doubtful whether the non-performance of this contract could cause non-pecuniary losses to the law firm. All other cases where pure services are provided between two companies would have similar effects – the performance would not lead to any direct financial enrichment of the promisee, but the non-performance would cause him pecuniary losses only. It seems that this criterion does not work in commercial contracts.

On the other hand, there are many cases where the promisee will be enriched as a result of the performance, but he would still suffer non-pecuniary losses in case of breach. If a famous artist is engaged to paint a family portrait which is supposed to commemorate a special event, his performance would result in an increase of the promisee's financial standing by the value of the portrait. Despite that a breach may cause non-pecuniary losses to the promisee. If during a refurbishment of a house the promisor damages some valuable furniture, the promisee would suffer pecuniary losses related to the diminished value of his property and non-pecuniary ones deriving from the lack of aesthetic and pleasurable amenities. This criterion fails to encompass cases where the contractual performance enhances the financial position of the promisee, but it also provides some non-pecuniary benefit to him. Therefore, the principle that needs to be found should look for something other than the actual financial result of the performance. If it does not, it fails to acknowledge two important groups of cases. The first is when some pure services between two commercial parties are provided and the second is where the contract aims to confer both pecuniary and non-pecuniary benefit to the promisee.

Conclusion to subsection b

The cases explored in the present subsection demonstrate the incapability of the traditional criteria to distinguish pecuniary and non-pecuniary losses. If it is considered that the intangible character of the losses defines their non-pecuniary nature, then there are some significant instances where incorporeal or immaterial harms have pecuniary essence. On the other hand, some losses that are perceived through their physical or material manifestations are non-pecuniary. Furthermore, it could be thought that the criterion that could differentiate pecuniary and non-pecuniary losses is the specific nature of the contractual subject matter. This proposition also collapses. There are some contractual subject matters whose non-performance causes either pecuniary or non-pecuniary losses and, in certain cases, both. It might be objected that this deficiency is due to the inappropriate perspective through which some authors examine the contractual subject matter. Instead of its general nature, its particular features could be used for the identification of the cases where non-pecuniary losses are caused. Hence this does not prove to be a workable solution either. The impossibility of market evaluation of the subject matter does not identify cases where non-pecuniary harms could be inflicted. Other more complex criteria taking into consideration the specific subjective value of the performance also fail to do so. There are

many cases where despite the presence of a consumer surplus, no non-pecuniary losses were caused and many other instances where, despite the lack of a consumer surplus, the promisee could suffer non-pecuniary harms. Lastly, the lack of patrimonial enrichment of the promisee as a result of the performance is not a sign for possible suffering of non-pecuniary losses.

None of these criteria can define the circumstances in which such harms could be caused. Their examination demonstrates that a different approach to this question should be taken. On the one hand, the analysis in this subsection provides a new perspective on some private law theories whose merits seem to be questionable. On the other hand, it is a necessary step towards the examination of the nature of non-pecuniary losses. If none of the feasible elements of the contractual relationship could be used for differentiating between the two types of losses, then it could be thought that a completely new solution to this issue has to be found. This could include an identification of a new feature of the agreement which has not yet been examined in the legal literature. At present the legal theory is unable to provide an answer to this important question without whose resolution no further examination of non-pecuniary losses is possible, including questions of their essence and the ways in which they could be compensated. The pursuit of this new principle that can distinguish cases where non-pecuniary losses may be caused is the central element of the following analysis.

(c) Distinction with regard to the promisee's contractual interest

Introduction to subsection c

The previous two subsections explore possible criteria distinguishing between pecuniary and non-pecuniary losses that could be inferred from the common law or traditional theoretical perceptions about the nature of these harms. Although none of the authorities aims to examine such a differentiation directly, most contain analyses of some specific consequences of contractual breach that could provide useful starting points from where the origin of non-pecuniary losses could be traced. A closer textual analysis of the cases shows that the manner in which these harms were perceived does not support a decisive conclusion with regard to their distinction from other losses. As further explored in the third chapter,¹²⁶ the case law provides better opportunities for examination of the nature of non-pecuniary losses rather than their origin. But this does not mean that the previous subsections were futile with regard determining of a possible criterion for differentiation between pecuniary and non-pecuniary losses. It has been established that, if there is a certain element of the contractual relationship that could identify the type of losses which would be inflicted as a result of breach, it will not be the contractual subject matter or any of its particular qualities.

The purpose of the present subsection is to continue this line of analysis on a more abstract level. It proposes a general criterion that is both uncontradictable with the common reasoning of the authorities and able to determine in an unambiguous and indisputable manner the contracts where non-pecuniary losses could be caused. It is argued that these losses can be inflicted only where the promisee has a non-pecuniary contractual interest in the performance. This would be in all cases where he would aim to achieve something else than a mere increase of his financial wealth. The analysis

¹²⁶ cf. chapter 3, section B, subsection c, parts *iii* and *iv*.

in the present subsection is divided into four parts. The first one introduces the concept of contractual interest and its constitutive elements and explores their ability to determine the type of losses that are suffered as a result of breach. The second part continues this study on a more specific level. It examines how the proposed model for distinguishing pecuniary and non-pecuniary losses fits into the authorities that are reviewed in the preceding parts of this section. The third part places the contractual aim within the structure of the contractual relationship and explains how it differs from the contractual subject matter. The last part defines in which cases the contractual aim is of non-pecuniary nature and when the contractual performance does not lead to enhancement of the promisee's financial standing.

(i) Contractual interest and its constitutive elements

Non-pecuniary losses, as all other consequences of non-performance, are inflicted only when the contractual subject matter is not rendered to the promisee. But as explored earlier,¹²⁷ the nature of the contractual subject matter cannot determine the type of harms that may result from breach. Indeed, non-performance of contracts with identical subject matters can cause different types of losses. We can conclude that the type of losses suffered does not depend on the contractual subject matter. There must be another factor that defines the harms which are sustained by the promisee. This other factor should take into consideration the promisee's interests in the contractual performance, where this interest is understood to exceed the mere rendering of the stipulated subject matter of the agreement.

All the same, there is a relationship between the contractual subject matter and these losses too. If the contract is performed as promised, no relevant harms could be suffered. Furthermore, if the common reason for all feasible losses that are caused as a result of the non-performance is the non-delivery of the promised subject matter, then there must be some correlation between them. It is certain that the causal chain that leads to infliction of harms commences with the contractual breach and it is further known that the breach itself does not determine the type of losses sustained.¹²⁸ It can therefore be concluded that non-performance affects another element of the contractual relationship, which in turn can determine the type of harms that are suffered.

The parties' agreement does not include only an obligation of the promisor to provide a certain result, referred to as a subject matter. It further contains an element beyond that – the immediate aim which the promisee strives to achieve upon the receipt of the contractual subject matter. As is explored in the present subsection and further in this chapter,¹²⁹ this aim exists in all cases and it is the basis for the promisee's interest in the formation of the agreement. The performance of the contract serves a further interest beyond the mere receipt of the covenanted contractual result. The promisee does not merely desire a delivery of the agreed subject matter, but he pursues a further aim which is served by that performance. This interest could be inferred from the contents of the agreement, from the circumstances in which it is concluded or otherwise. The promisee would not merely want to receive the stipulated subject matter, but to use it for the purposes which were agreed with the promisor or which might be inferred from the context in which the agreement was concluded. A taxi ride to an airport is requested so that the promisee is able to catch a plane or to meet

¹²⁷ *cf.* the present chapter, section A, subsection b, part ii.

¹²⁸ For more details about the consequences of the non-performance, *cf.* chapter 3, section A, subsection b.

¹²⁹ *cf.* the present chapter, section B, subsection a.

someone there. A book is ordered from an online bookstore so that it could be used in a certain way, which would include a prospect of this book being read by the promisee or a third person or being kept as a piece of art or a source of knowledge and then sold at a later moment.

The non-achievement of the contractual aim is due to the non-performance of the agreement¹³⁰ and in that respect it fits neatly within the reasoning explaining the mechanism by which losses are caused. The unfulfillment of the contractual aim is the inevitable and the most logical consequence of the contractual breach and, as is explored further, it is the missing element that can explain why in certain cases a specific type of harm is sustained. The contractual aim might be perceived also as the immediate outcome that follows from contractual performance. It is nothing more than those properties or qualities of the contractual subject matter, which are the promisee's reason for entering into the agreement. The aim represents the effect that the receipt of the contractual result would have on the promisee's position with regard to his financial standing too.¹³¹ It will be claimed that in cases where the contractual aim includes something apart from, or along with, the financial enrichment of the promisee, then its non-achievement may lead to infliction of non-pecuniary losses. Conversely, when the only aim with which the promisee forms the agreement is to enhance his financial standing, then the breach would cause him pecuniary losses only.

In the present thesis the notion of the contractual aim will be examined within the context of a wider concept – the promisee's contractual interest. This specific promisee's motivation for receiving the contractual subject matter will initially be reviewed in relation to its ability to provide a distinction between pecuniary and non-pecuniary losses and after that,¹³² a more comprehensive review of the promisee's contractual interest will be conducted. The concept of contractual interest will be employed further in the present thesis when the nature of non-pecuniary losses is explored.¹³³ It will be argued that the contractual aim, along with the contractual subject matter, forms the contractual interest of the promisee and in all cases when the promisee's contractual aim is not limited to enhancement of his patrimonial wealth, but includes any other purpose, the promisee has a non-pecuniary contractual interest. Furthermore, it will be argued that in all cases when the promisee has some non-pecuniary contractual interest, then the breach of the agreement causes him non-pecuniary losses.

(ii) The contractual aim in the leading authorities

One early case where damages for non-pecuniary losses were recovered was *Hobbs*. If this case is examined from the perspective of the promisee's contractual aim, it will be seen that he wanted to receive the agreed railway service not solely because of his desire to be transported to a certain place. He had some consequent purpose – to be able to walk to his house from the destination to which he was promised to be conveyed. Beyond the subject matter of the contract, which included only the transportation to the stipulated certain railway station, the promisee had further aims that

¹³⁰ For exceptional cases where this is due to other facts *cf.* the present chapter, section C, subsection b, part ii.

¹³¹ For more detailed analysis of the relationship between contractual aim and contractual subject matter, *cf.* the present chapter, section B, subsection b, parts i and ii.

¹³² *cf.* the present chapter, section C.

¹³³ *cf.* chapter 3, section B, subsection a, part iv.

motivated him to conclude the contract and whose non-achievement would in significant degree defeat the purpose of the agreement. These aims are of non-pecuniary nature where they do not contribute to the promisee's financial enrichment – as a result of the contractual performance his patrimonial wealth is not increased. They are related to his desire not to have to walk together with his family to his final destination too long. He did not want to receive the service *per se*, but wished to fulfil his other, consequent aims. They are not part of the subject matter of the agreement, but they motivated him to conclude it. In this case, they were of non-pecuniary essence and because the contract was not performed, the promisee suffered non-pecuniary losses.

The advantages that the non-pecuniary contractual interest can offer as a principle of distinguishing non-pecuniary losses can be demonstrated in *Jarvis* as well. The promisee wanted to obtain certain holiday facilities which might be considered to be the subject matter of the agreement. All of them were material in their nature and could be subjected to market evaluation easily – afternoon tea and cake, Swiss dinner by candlelight, fondue party, yodeller evening. In cases of breach their lack does not automatically and inevitably lead to non-pecuniary losses. The decisive element in the case is the specific aim that the promisee pursued with regard to receiving the contractual subject matter – to spend pleasurable time during his winter holiday. Therefore, if the aim of the trip was different, for example for business or other purposes, the lack of these elements of the subject matter might not have led to non-pecuniary losses. The promisee's disappointment and distress pertained to the lack of performance, but it is only in conjunction with the promisee's aims that the breach caused him non-pecuniary losses. The intermediate element between the non-performance and the losses that flowed from it were the promisee's contractual aims. They were associated with the usage or consequences of the contractual subject matter. The fact that the promisee was not able to achieve these non-pecuniary aims caused him non-pecuniary losses.

In *Watts* the promisees were considering buying a property and requested a survey to assess the structural and general condition of a house they liked. From the facts¹³⁴ it might be inferred that they were particularly interested if some additional modernisation work might be required apart from the ordinary ongoing maintenance and repairs that were needed inevitably for any real estate. The contractual subject matter was the preparation of that survey, but the aim that the promisees wanted to achieve was not merely to receive the information incorporated in the document. They wanted to be able to assess the necessity of modernisation of the house and on that basis, to decide if they desired to purchase it. This contractual aim would have changed not only their financial position, but their quality of life too. This could explain why the lack of the required information caused non-pecuniary losses to them. In that case the subject matter of the contract – preparing a survey – had a market value and might have increased the promisee's financial position, but still led to non-pecuniary losses because his specific aim was of non-pecuniary nature.

In *Ruxley* the promisee specified expressly that a pool with a certain depth was to be built in his house. The contractual subject matter was the construction of this swimming pool. One of the immediate aims that the promisee wanted to achieve was the possibility of using the swimming pool as specified in the agreement between the parties – the promisee wanted to be able to dive safely there. This contractual aim defined his non-pecuniary interest in receiving the promised

¹³⁴ *Watts*, *op. cit.*, at 1424 *per* Ralph Gibson L. J.

subject matter and determined the non-pecuniary nature of the losses that could be caused in case of breach. Many of the home improvements would lead generally to increase in the market value of the property. Along with this, they would also result in enhancement of the quality of the life of those who are using the property. *Ruxley* is no exception to this principle. Despite the purely tangible nature of the contractual subject matter, the promisee could suffer non-pecuniary losses if his interest was affected by the breach. In that respect this case represents one particularity which distinguishes it from other similar instances where non-pecuniary losses were claimed – despite the partial non-performance the contractual aim was attained. This is explored further in this chapter.¹³⁵

If *Farley* is looked through this perspective, it will be concluded similarly that the promisee had a specific non-pecuniary interest in receiving the information requested in a survey. It was clearly established that he wanted to buy a tranquil and peaceful house in the countryside. He could choose the most suitable property when taking into consideration the information that he expressly requested about the assessment of aircraft noise levels in the survey. Similarly to *Watts*, the subject matter of the agreement was preparation of that survey and the contractual aim was the promisee's ability to make a decision on the purchase of the property. Although the survey had a market value and could be considered to have a tangible nature, the aim that the promisee wanted to achieve was of non-pecuniary essence. It defined his non-pecuniary contractual interest and the type of losses that were caused by non-performance.

(iii) Contractual interest and content of the agreement

It has been suggested¹³⁶ that the contractual subject matter cannot be a criterion by which we might distinguish pecuniary and non-pecuniary losses. The subject matter is a specific commodity that the promisee is entitled to receive for the consideration provided to the other party. The contractual subject matter is therefore always quantifiable in terms of its market or other price. The subject matter *per se* does not provide any information about the additional value that the promisee would attach to the performance. Commissioning a family portrait does not in itself tell us why such an agreement is formed. If this commissioning is not looked at in conjunction with the overall content of the contractual interest, it is impossible to understand the particular value that the performance is expected to provide to the promisee. The artist's role might be limited to increasing the attractiveness of the rooms where his work is to be exhibited, with a view to resale of the whole property. Alternatively, the promisee might want to obtain the painting for the aesthetic pleasure that he would hope to gain in observing it every time when he uses the room where it is planned to be placed.

The content of the promisee's contractual interest should not be limited to the subject matter that the promisor is due to render. It is certainly incorrect, even if more traditional concepts like performance or expectation interest are employed,¹³⁷ to assume that they do not contain any other element of the contractual obligation than its subject matter. This would be so for at least two reasons. On the one hand, if it were possible that the concept of subject matter can

¹³⁵ *cf.* the present chapter, section C, subsection b, part *iii*.

¹³⁶ *cf.* the present section, subsection b, part *ii*.

¹³⁷ The present work uses the new term 'contractual interest' in the sense explained in the present chapter, sections B and C. However, the concept of performance or expectation interest has been subject to numerous analyses for almost a century. *Cf. e.g.* Webb, Charlie, 2006. Performance and Compensation: An analysis of Contract Damages and Contractual Obligation, *Oxford Journal of Legal Studies*, 26(1), pp. 41–71 and the literature referenced therein.

substitute the notion of contractual interest successfully, there is no reason for introduction of the idea of contractual interest at all. It would have led merely to unnecessary complications of the contractual theory with two duplicate terms – performance and performance interest. On the other hand, it has been established that the concept of subject matter is unable to express the promisee's interest in the contractual performance. Then there should be another element that must be able to do so. If the contractual subject matter does not incorporate the additional value of the performance or, within the terms of the present work, if the subject matter does not exhaust the contents of the promisee's contractual interest, there must be another element, which does so. This other element is the contractual aim. It is the immediate consequence that flows from the delivery of the subject matter.

The additional value that a contractual subject matter might have to the promisee and which is an element of the non-pecuniary contractual interest can be discovered in the overall contents and context of the agreement. It cannot be limited to mere examination of the subject matter that is due to be rendered. When concluding a contract, the promisee would typically aspire into achieving a certain aim with it. This could be buying a handsome property, reaching a specific destination more easily or spending pleasurable vacation in a picturesque place. The promisee might conclude various contracts that will not necessarily oblige the promisor to provide the desired goals directly – for example he might have to transport the promisee to a certain railway station that would be closer to his final destination, to explore the real estate market and suggest a suitable property or to offer lodging at a chosen place with certain facilities. These contractual results are achievable solely with the efforts that the promisor is expected to make as part of his obligation. However, while the promisor's duties are limited to providing the subject matter only, the contractual aim would typically result in something more than this. It would be so as the contractual aim is the outcome that the promised contractual benefit would afford to the promisee and could be fulfilled with the receipt of the promised contractual benefit, following the usual course of things or additional assistance of some third parties or the promisee himself.

The traditional understanding that could be inferred from English contract law theory¹³⁸ is that the subject matter exhausts the contents of the contractual obligation. Indeed, the promisor is obliged to provide the promised contractual result only. He has no further commitment in respect to any subsequent aims that the other party might want to achieve with the agreement. However, once the contractual subject matter is delivered to the promisee, certain changes in his position might be observed. They are related to the inevitable causal chain of consequences that would be brought by the performance of the contract. Even in the most simplistic cases where the subject matter might initially seem to be attained for no further purposes apart from its mere acquisition by the promisee, a closer look into the contractual relation would reveal that this is not so. Another aim beyond the simple receipt of the subject matter is always pursued by the promisee. When a material object is acquired, it is done because of his desire to use some of its qualities or properties. Real estate might be purchased because of the promisee's wish to use it as a place of tranquil abode or merely as a good investment. When a service is rendered, it is always because of its advantageous effects on the promisee. If a pianist is hired to play some of Chopin's works, it should be because the promisee would wish to hear these performances. Similarly, if a construction of a house is commissioned, it will be because the promisee would want to use it in a particular fashion.

¹³⁸ Peel, E., *op. cit.*, paras 6-001 and 17-001.

If viewed from such a perspective, the subject matter of the agreement is never able to satisfy the promisee's contractual interest alone. It has to be supplemented with the contractual aim in all cases. Only when the promisee achieves the contractual aim, will his contractual interest be fulfilled. This dependency might be derived from the nature of the contractual relationship too. Contractual rights have a dynamic essence. Unlike the proprietary rights, they are conceived so that a certain result is provided to the promisee. The promisee, however, would use this result for a lengthier period of time in various forms. The contractual result might provide a change in his proprietary rights or deliver a service to him whose effects would impact his tangible or intangible personal sphere. The contractual aim includes but are not limited to the most imminent¹³⁹ outcome that the promisee legitimately expects to receive with the contractual performance.

The aim and the subject matter of the contract are concepts that are relatively close to each other as they both represent what the promisee would receive after the performance. However, their nature and functions are rather divergent. The subject matter is the benefit that the promisor is obligated to provide to the other party. It defines the boundaries of his liability. It is the result that he is indebted to deliver. In contrast to that, the promisor has no direct commitment with regard to the promisee's contractual aim. But the relationship between them is causal – the contractual subject matter is the promisee's chosen means of pursuing the contractual aim and it is the promisor's obligation to provide those means. This causal dependency between the subject matter and the aim defines the promisee's contractual interest. The promisee would not be wishing merely to receive the subject matter *per se*, rather than being able to achieve his contractual aim. The contractual aim is the subsequent causal outcome that follows from the contractual subject matter. It is the way in which the subject matter is designed to affect the promisee.

(iv) Non-pecuniary nature of the contractual interest

The examples employed in the present subsection demonstrate the irrelevance of the subject matter with regard to the distinction between pecuniary and non-pecuniary losses. In many cases the promisor would be obliged to provide a tangible benefit that has a purely material nature, but its delivery would lead to something other than the promisee's financial enrichment. If such an agreement is not performed, he would be deprived of this additional non-pecuniary outcome and would suffer non-pecuniary losses. The non-pecuniary contractual aim that the promisee pursues is the missing element between the contractual contents – the specific obligation that the promisor needs to deliver – and the type of harms which are caused when he does not do so. The contractual aim defines the purposes for which the promised subject matter of the agreement would be used. It is also able to predetermine the possible consequences of an eventual breach and the manner in which it will affect the promisee's interest in the performance – it will deprive him of the particular way in which he would have been aiming to use the stipulated subject matter. Although the contractual aim will not always be incorporated in the terms of the agreement,¹⁴⁰ this is the only criterion that can be used to identify the contractual relationships where non-pecuniary harms could be caused.

¹³⁹ For the consequential non-pecuniary contractual aims, *cf.* the present chapter, section C, subsection c, part *iii*.

¹⁴⁰ *cf.* the present chapter, section B, subsection a, parts *ii-iv*.

The promisee has a non-pecuniary contractual interest in all cases when his aims are not limited to enhancement of his balance sheet patrimonial wealth. This includes cases where the promisee concludes the contract for achieving some enhancement of his financial position along with other non-pecuniary purposes which would have motivated him to enter into the relationship. In many cases the promisee's non-pecuniary aims will be attained through material objects, which, along with their aesthetic, cultural, historic and other sentimental values, will also have a market price and contribute to some improvement of his balance sheet position. If it is accepted that non-pecuniary losses can be caused only in cases where the agreement does not aim to provide an overall increase of the promisee's wealth, this would comprise many contracts and thus leave lesser scope for non-pecuniary losses. When a house with certain aesthetic qualities is built, or an artist is invited to paint a memorable event, the overall financial welfare of the promisee is increased with the material objects that will be received as an outcome of the performance. In both cases he would obtain a product that will have some financial value. However, the market price of these products will not exhaust the entire value that the performance would be designed to provide. In such cases the promisee's non-pecuniary contractual interest exists comfortably along with any accidental or intended financial benefit from the contract.

The promisee has a non-pecuniary contractual interest in a very wide variety of contracts. This is due to the manner in which this contractual interest is defined – it includes all cases but those where his sole aim is to acquire a financial profit from the agreement. It will include even some instances in which the promisee is borrowing money or obtaining financial instruments with similar effect like shares, securities or bonds to achieve a non-pecuniary aim. Though these are border cases, they can be explained on the notion of the contractual interest that the promisee has – although the performance of the promisor consists of payment of a certain amount of money, the aim that the promisee wants to achieve is of non-pecuniary nature and therefore the breach could cause non-pecuniary losses to him. The non-pecuniary contractual interest might be discernible in cases of bank mortgages or loans which are intended particularly for a purchase of a property or a chattel with non-pecuniary value to the promisee.

Conclusion to subsection c

The only principle that identifies cases where non-pecuniary losses can be caused is the promisee's contractual interest. Although there are some other authors who introduce terms aiming to express the advantage that the promisee will gain from the performance, none has similar functions. All previous work merely uses such terms as a measure of losses, without considering other roles that they can have. The present thesis is the first to consider the contractual interest as the basis on which the type and scope of losses can be determined. But the contributions of the present section are not limited to identification of this new function of the contractual interest. The promisee would never desire to obtain the subject matter of the agreement without pursuing some further aim. If that further aim leads to something other than his balance sheet enrichment, then it is claimed that he has a non-pecuniary contractual aim and that the breach in these cases will cause him non-pecuniary losses. The subject matter and the aim are constitutive elements of the contractual interest. The identification of the elements of the contractual interest is the second important contribution of the present section to the legal scholarship.

These conclusions can be confirmed by a closer look at the most popular cases where non-pecuniary losses were identified. The promisee would not typically contract for receiving his aspired aim directly, but he will negotiate a certain contractual subject matter that will deliver this aim. This approach may be explained by the nature of the aim – it is something that cannot be provided by the promisee directly, but it could follow as an outcome of his performance. Thus, a railway company cannot bring its customers to their final destination as it operates certain routes only. A property surveyor is unable to provide his clients with a tranquil country house as he is not an estate agent or does not own such houses. However, as a result of the performance, the promisees in all these cases would be able to achieve something beyond the contractual subject matter that would be provided to them by the other parties. In all cases there is always a further reason beyond the delivery of the stipulated subject matter for which the promisees forms the contract. This further outcome incorporates the promisee's contractual interest in the performance. This interest would always have a non-pecuniary element when as a consequence of the performance he fulfils a certain non-pecuniary aim. It is immaterial if, as a result of this, a supplementary increase of the promisee's financial standing could be identified – the contractual interest, as it will be further explored in this chapter, could have a complex nature, incorporating both pecuniary and non-pecuniary elements.

Conclusion to section A

There is no better way of commencing the study of the nature of non-pecuniary losses than by examining their origin. Nevertheless, the determination of the type of contractual relationships where these harms can be caused or the particular features of the contractual relationship which define the categories of harms is challenging. The courts tend to examine the recovery of damages for non-pecuniary losses rather than their essence or specific features. A closer look into the cases does not reveal any intelligible pattern or feature of the agreements whose non-performance causes non-pecuniary harms. The legal literature does not go further – there are no works which describe the principles on which a distinction between the different types of losses might be drawn. Despite that, an analysis of the leading authorities reveals that non-pecuniary losses could be caused in a wide variety of cases. It could also be assumed that there is a correlation between the subject matter that the promisor is due to render and the infliction of losses. Nevertheless, there is no direct relationship between them.

There are certain principles that might be conceived as able to identify the contracts where non-pecuniary losses are inflicted. They could be derived from the unanimous assumption that the non-pecuniary nature of certain instantiations of losses is not questionable and does not require special study. All the same, due to the lack of any other alternatives, these principles can be thought to be the most plausible and credible criteria for distinguishing pecuniary and non-pecuniary losses. One can think that the intangible nature of the losses could define their non-pecuniary essence. Other would suggest that the impossibility of market evaluation of the contractual subject matter determines the type of losses. It could also be thought that the specific nature of the contractual subject matter is the principle that determines what harms could be inflicted. Other propositions could be related to the role of the consumer surplus in the contractual relationship. Lastly, the lack of pecuniary enrichment on behalf of the promisee as a result of the performance might be conceived as a feature that can identify agreements where non-pecuniary losses could be caused. Despite their diverse and seemingly comprehensive nature, none of these criteria is workable. All of them fail to provide a clear and

unambiguous principle which could describe the origin of the losses and the circumstances in which they could be inflicted. Despite that the analysis of these possible alternatives supports the conclusion that the sought criterion must be related in a particular manner to the subject matter of the agreement.

It is not the stipulated subject matter which determines what losses may follow from breach. Nonetheless, the factor that does determine this is related to the subject matter. This factor is the contractual interest. It expresses the overall advantage that the promisee receives from the performance and incorporates the reasons for which the contractual subject matter is procured. The non-pecuniary contractual interest encompasses the promisee's aim in obtaining the stipulated performance for achievement of something other than, or along with, an increase in his patrimonial wealth. In contrast to all alternative principles that look merely into the financial outcomes of the performance, the idea of the contractual aim is able to identify possible infliction of non-pecuniary losses even in cases which lead to enhancement of the promisee's financial position. Conversely, it is also able to explain why in other instances despite the lack of any increase of his patrimonial wealth, no such losses could be caused. The success of this principle is due to its flexibility in reflecting both the non-pecuniary outcome of performance and the principal ability of the contractual subject matter to provide such a result. This new function of the contractual interest can be explained by the correlation that exists between its constitutive elements – the stipulated subject matter and the aim that the promisee pursues.

The promisee's non-pecuniary contractual aim is the central element that defines his non-pecuniary contractual interest. In order to perceive the nature of non-pecuniary losses caused when this interest is not fulfilled, a more detailed understanding of the nature of non-pecuniary contractual aim is needed. It will reveal that the origin of non-pecuniary losses is deeply rooted in the contents of the contractual relationship and is the sole motivation for which the promisee concludes the contract. In that respect a study of the non-pecuniary contractual aim is a necessary premise for a comprehensive understanding of the essence of non-pecuniary harms. The importance of the non-pecuniary contractual aim with regard to the nature of non-pecuniary losses is both instrumental and substantive. On the one hand, non-pecuniary losses could only be caused if the promisee pursues a non-pecuniary aim. On the other hand, the relationship between his contractual interest and the type of losses is not only causal – the contents of the losses, as it will be further explored in the subsequent chapter¹⁴¹ is determined by the contractual aim too. This requires a separate examination of the nature of the non-pecuniary contractual aims. This is done in the following section of the present chapter.

B. Non-pecuniary contractual aim

Introduction to section B

The parties to the contractual relationship are those who define its contents. They agree on the subject matter of the contract, which is the result that the promisor is obligated to confer to the other party. They might reach further assent on the immediate purpose that the promisee would endeavour to achieve with the contractual performance. This is the contractual aim, which is the objective that he would, or intends to, attain upon the receipt of the stipulated contractual

¹⁴¹ *cf.* chapter 3, section B.

benefit. This aim has various implications on the effects of the contract. It determines the adverse consequences following from non-performance and, in turn, the remedies that are available to the promisee to make them good. It has also been suggested that in most cases the contractual aim would be identifiable from the contents of the agreement objectively. The aim might be either directly stipulated by the parties, implied by them when they chose a particular contractual subject matter or discernible from the circumstances in which the contract is concluded. Lastly, in some cases the promisee might be able to establish the content of the aim unilaterally.

It has been argued that the contractual aim defines the promisee's non-pecuniary contractual interest. This in turn is the only criterion that can be used for distinguishing pecuniary and non-pecuniary losses. The significance that the present thesis attaches to the concept of contractual aim requires its more detailed examination. On the one hand, such a study is needed due to the novel nature of this concept. No other writers have thought that the contractual aim, along with the subject matter, is an element that constitutes the contractual interest. Other terms which various authors refer to as the performance or expectation interest,¹⁴² and which purport only to provide some measure of the damages, have a narrower meaning than the idea of the contractual interest, as that term is understood here. When using such terms, other scholars explore their functions, but never engage in a discussion about their structure or constitutive elements. The approach adopted in the present work perceives the contractual aim as a central element that defines the contents of the whole contractual obligation to a much larger scale than previously thought. A complete exploration of all repercussions that the contractual aim would have on the structure of the contractual obligation exceeds the boundaries of the present work. This does not prevent a more detailed examination of the circumstances in which an agreement should be considered to have a non-pecuniary aim. The main research question of the present subsection is the identification of the non-pecuniary contractual aim and examination of all implications that it might have on the other elements of the contract and its parties.

The aim pursued by the promisee as a constitutive element of the contractual interest defines the nature and the extent of losses which he suffers after the breach. The present subsection continues to explore the relationship between the contents of the agreement and its implications on the harms that are caused by non-performance.¹⁴³ The main purpose of this subsection is to confirm that the contractual aim is the only element of the agreement leading to non-pecuniary losses. It is established that the existence of non-pecuniary aim is the sole principle that can explain the origin of non-pecuniary losses and that their infliction does not depend on any other element of the contractual relationship. It is demonstrated that this principle does not depend on the particular rights and obligations of the parties or their being natural or legal persons. The role of the contractual aim as it is explored in this section aims to support the previous conclusion¹⁴⁴ that in all cases where the promisee is not exclusively aiming to enhance his financial position, non-pecuniary losses will be suffered and that this exhausts all circumstances in which such harms might be inflicted.

¹⁴² For terminological distinctions between these terms *cf.* the previous section A, subsection c, part *iii*.

¹⁴³ The scope of the present section will be limited to the concept of contractual aim while the contractual interest will be examined in the next section C.

¹⁴⁴ *cf.* the present chapter, section A, subsection c, part *iv*.

The present section has three subsections. The first examines the contractual aim initially in its context within the structure of the agreement. The purpose of this first subsection is to explore how the non-pecuniary contractual aim can be identified. It looks into the structure of the contractual relationship as it is formed by the parties. It proposes a general approach which, regardless of the specific contents of any agreement, can identify the non-pecuniary contractual aim. But the contractual aim exists in the context of the agreement. It is not an abstract or isolated model that has no actual existence. The subsequent two subsections explore the possible effects that other elements of the contractual relationship might have on the aim. Firstly, it is seen if the subject matter can predetermine the contents of the aim. It is argued that despite the specific causal relationship between these two elements, the promisee is able to pursue various non-pecuniary aims regardless of the nature of the promised contractual benefit. Secondly, it is explored if the parties to the contract can pursue non-pecuniary aim always regardless of their nature. In this last subsection it is suggested that, whether the promisee is a natural or artificial person, the only criterion on which his contractual interest might be assessed is the nature of the aim that he pursues with the agreement.

(a) Identification of non-pecuniary contractual aim

Introduction to subsection a

The contractual aim has been defined as the immediate purpose for which the promisee concludes the contract and which could be achieved as a result of the contractual performance. It is the subsequent outcome that the promisee could attain after the contractual subject matter is provided to him. In the present thesis the aim is apprehended as the causal consequence that the promisee endeavours to achieve with the performance of the agreement and a crucial constitutive element of the contractual interest. Like the covenanted contractual benefit, the aim can be perceived not as certain behaviour of the promisor, or an effort that he is expected to make, but as a result,¹⁴⁵ which could be accomplished as an outcome of the performance. It is not an element of the obligation that the promisor needs to provide. He is merely responsible for the delivery of contractual subject matter, which in turn, following the usual course of things or otherwise,¹⁴⁶ leads to attainment of the contractual aim.

The present subsection explores the identification of the contractual aim.¹⁴⁷ The purpose of the analysis is to propose a workable and practical key for determination of the contractual aim in any given agreement. It is argued that the typical principles of construction of contractual content should be applied with no modifications or qualifications when the aim is identified. The principle position of this work is that the aim has a consensual origin either when it is explicitly agreed between the parties¹⁴⁸ or when it could be derived from a contractual element that has been explicitly agreed.¹⁴⁹ However, the aim is not a necessary element that the parties need to agree on. In some rarer cases it might be impossible

¹⁴⁵ *cf.* the chapter 3, section A, subsection a, part *ii*.

¹⁴⁶ For more details about the relationship between the contractual subject matter and aim, *cf.* the present chapter, section C, subsection a.

¹⁴⁷ The effects of the contractual aim and its relationship with other elements of the contractual contents will be examined in the present section in its two subsequent subsections *b* and *c*.

¹⁴⁸ *cf.* the present subsection, part *i*.

¹⁴⁹ *cf.* the present subsection, parts *ii-iv*.

to identify any aim and there will be provisions related to the subject matter of the agreement only. Nonetheless, this should not be considered as an impediment for identification of the aim beyond the terms of the contract. Despite the lack of explicit or implicit agreement on the aim, the promisee would in all circumstances pursue a result that exceeds the mere delivery of the contractual subject matter. In these cases, some alternative principles for the identification of the aim are proposed.

There are four distinctive ways in which the aim could be identified. Firstly, it might be explicitly or implicitly derivable from the contractual terms. The parties could choose not only to agree on the subject matter that the promisee is due to receive, but also on the purposes for which it is to be used. Secondly, the aim could be inferable from the factual circumstances in which the agreement is concluded. Lastly, it may follow necessarily from the nature of the promised contractual benefit. These three alternatives are exhaustive and each one of them is examined separately in the first three parts of the present subsection. It is possible that none of these options supports a decisive conclusion about the content of the aim. In this case the promisee should be allowed to assert unilaterally what his aim is. These instances are examined in the last part of this subsection.

(i) Identification by an agreement between the parties

English law establishes certain requirements for contractual formation.¹⁵⁰ If they are satisfied, there are no general constraints with regard to the contents of the agreement and the parties might include any particular statements that they should consider suitable for protection of their contractual interest.¹⁵¹ Provided that all formal conditions for the obligatory effect of the agreement are met, the parties are not limited to any additional¹⁵² content that they may wish to include in their contractual stipulations. Although consideration is provided only for the promisor's obligation to deliver the contractual subject matter, the validity of the agreement would not be affected by any further terms that are covenanted additionally. All contractual undertakings regardless of their being an element of the contractual subject matter or of any additional statements¹⁵³ will have contractual force if consideration is provided. Consideration is required for the subject matter only, but the binding force of the agreement would extend its effect on the contractual aim too. In this case, although the aim cannot in itself have a binding effect, it could be thought that the promisor agrees with its pursuit by the other party as a result of the performance that is due.

The promisor's obligation does not exceed his duty to provide the stipulated result to the other party. The contractual aim is the outcome that the promisee would obtain from that performance. It is a consequence of the delivery of the subject matter and in that respect, it is an independent element of the agreement. Hence the process of contractual formation need not extend to specifying the parties' contractual aims. An agreement would be valid if the necessary requirements for its formation are met. This does not mean that the parties do not incorporate other provisions in their

¹⁵⁰ Chitty, *op. cit.*, para 2-001 *et. seq.*

¹⁵¹ Nevertheless, there are specific limitations, *e.g.* unlawful contracts, contracts in restraint of trade etc., *cf. e.g.*, Chitty, *op. cit.*, para 16-001 *et. seq.*

¹⁵² Nevertheless, there are certain clauses which are implied by law, *cf. e.g.*, Chitty, *op. cit.*, para 14-036 *et. seq.*

¹⁵³ This term is used by Chitty, *op. cit.*, para 13-003.

contractual terms beyond description of the promisor's obligations. Indeed, it is very common that they would include a preamble, recitals, definitions, additional descriptions or even non-substantive clauses. Although all these provisions do not necessarily contain any explicit duties imposed to the promisor, they are incorporated in the terms of the agreement in the same manner as the contractual subject matter.¹⁵⁴ The classical concept of contract comprises of the obligations that the promisor needs to perform and it would not cover any of these types of provisions directly. However, they can be a source that would define the scope and the effects of the promisor's obligations and for this reason they are considered to be a part of the agreement that should require mutual consent expressed by both parties. The contractual contents might be rather richer and more extensive, covering a wide range of stipulations beyond the contractual subject matter.

The terms of the agreement could also include other statements apart from the contractual subject matter. This possibility could be supported indirectly by a reference to the manner in which terms are described in the legal literature¹⁵⁵ as including any contractual undertakings that impose liability in case of non-performance. As will be further explored,¹⁵⁶ the effect of the new concept of aim introduced in this thesis as an element of the contractual interest, is similar – to inform the measure of the liability imposed by the other terms. In that respect it is an element of the agreement that determine the proper response to breach. The understanding of contractual terms as undertakings that can lead to liability in cases of breach is based on the idea that the parties are at liberty to include any other statements in their agreement which they might find suitable to protect their contractual interests. This in turn, expresses the more general principle of freedom of contract.¹⁵⁷ The scope of the contractual terms is not limited to the description of the subject matter, but it would comprise any additional statements that could determine the consequences of non-performance. This would certainly include cases where the parties describe the contractual aim. The promisee concludes the agreement motivated by his sole desire to achieve this aim and therefore its inclusion in the contractual terms should be considered natural.

The task of identifying the aim of the agreement is a matter of interpretation.¹⁵⁸ The contractual conditions and warranties would describe the contractual subject matter, but they could also contain information about the aim. In order to identify it, these clauses need to be construed. All general rules for construction of contractual terms should be applied. The purpose of contractual interpretation is to identify the mutual intentions of the parties which might include their common understanding about the contractual aim that the promisee is to achieve with the performance. Like the other terms, the contractual aim is to be determined objectively, as it would be understood from the perspective of a reasonable person who is placed in the position of both parties.¹⁵⁹ The contractual aim could be inferable from any terms of the agreement regardless of their type. In the first place, the contractual aim will be typically reproduced in the contractual conditions as they incorporate the most important, central and substantial part of the agreement. However,

¹⁵⁴ About incorporation of terms *cf.* generally Chitty, *op. cit.*, para 13-001.

¹⁵⁵ *Ibid.*

¹⁵⁶ *cf.* the present chapter, section C, subsection b.

¹⁵⁷ *cf.* Chitty, *op. cit.*, para 1-031 *et. seq.*

¹⁵⁸ *cf.* generally, McMeel, G., 2011. *The construction of contracts*. 4th ed. Oxford: Oxford University Press and Lewison, K., 2015. *The interpretation of contracts*. 6th ed. London: Sweet & Maxwell.

¹⁵⁹ *cf.* Chitty, *op. cit.*, para 2-002.

not all contractual conditions would be related to the aim. In *Ruxley* it was established that the depth of the swimming pool, which seems to be a contractual condition, did not prevent achievement of the contractual aim – obtaining a pool in which, *inter alia*, it was safe to dive.

On the other hand, some warranties, whose breach would not allow the aggrieved party to regard himself discharged from further performance of the contract, could contain provisions with respect to the aim. The promisee might desire to obtain the contractual subject matter for some of its minor or less significant features which would be described in the warranties rather than in the conditions. In *Jarvis* the undertaking where the promisor agreed to provide specific food on some of the evenings might not be considered as a condition. This term, however, is a good indication from which the aim of the agreement could be inferred – ensuring a pleasurable winter holiday.

The identification of the aim requires interpretation of the whole text of the contract. In *Watts*, along with a clear description of the subject matter of the agreement – a survey which had to explore certain characteristics of a property – the parties seem¹⁶⁰ to have agreed that the contractual aim will be the ability of the promisees to decide if they wished to purchase this property based on the information that was to be provided by the promisor. In the agreement discussed in *Watts* there are arrangements for two matters. The first, which includes information about the contractual subject matter, contained covenants about the particularities of the survey. The second, whose contents is related to the contractual aim, describes the promisees' desire to be able to decide if they wished to purchase the particular house should it not require a substantive refurbishment. These two sets of statements would not be divided necessarily into separate terms. This supposes a careful analysis of all contractual undertakings so that their substance is clarified with sufficient precision. In *Farley* the contractual aim was stated even more directly. The promisee was entirely clear that he did not wish his prospective property to be on a flight path. His aim to find a tranquil and peaceful country house was directly implemented in the terms of the agreement.

Contractual terms might be implied in law or in fact.¹⁶¹ In both cases the terms might contain information about the aim. All principles that are generally explored in the legal literature with regard to implied terms,¹⁶² such as reasonableness, fairness and further policy considerations, could be applied in relation to the contractual aim too. It is accepted that the implication of some terms purports to provide business efficacy for the agreement and to express the obvious common intention of the parties.¹⁶³ Accordingly the implication of contractual terms is not limited to description of the contractual subject matter. It should be considered to have a broader purpose. The terms that are implied as a matter of fact depend on the presumed intention of parties as it could be derived from the contents of the agreement and the circumstances of its formation.¹⁶⁴

An interesting example of a contractual aim that could be implied in law might be discovered in a rental agreement. Its subject matter is to provide a property with certain characteristics that are described usually in the text of the contract.

¹⁶⁰ The text of the contract can only be inferred from the facts represented in the case, *cf. Watts, op. cit.*, at 1424.

¹⁶¹ *cf.*, e.g. *Société Générale, London Branch v Geys* [2012] UKSC 63, [2013] 1 A.C. 523, [55].

¹⁶² Chitty, *op. cit.*, para 14-005.

¹⁶³ *cf.*, e.g. *Alpha Trading Ltd v Dunnshaw-Patten Ltd* [1981] 1 Lloyd's Rep. 122, 128, 131.

¹⁶⁴ Chitty, *op. cit.*, para 14-006.

In addition to this, in such an agreement the courts are able to imply a broader aim which exceeds the contractual result that the promisor promised. In *Liverpool City Council v Irwin*¹⁶⁵ the aim of the agreement could be derived from the terms implied by the court. It might be construed that the tenants' aim was to live in a property with sufficient amenities that would allow for its satisfactory habitation. There are further examples which can also illustrate the importance of the terms implied in law with respect to determination of the aim. There are certain statutory provisions¹⁶⁶ where specific terms are implied not solely to describe the contractual subject matter, but which contain sufficient information for identification of the aim. In contracts to supply goods, digital content or services a 'fitness for purpose' is required.¹⁶⁷ In such cases even if the parties have never agreed to such an aim, it will be implied in law, based on the particular type of the subject matter. This could be regarded as an example where the aim is implied more directly into the contents of the agreement. There could be other cases where the aim might be derived from terms that are implied in law. A term is implied that the goods have to match the sample.¹⁶⁸ Furthermore, from the specific characteristics of the sample, certain conclusions about the aim might be drawn. In these cases, the aim would have been derived from individual specifications of the contractual subject matter even though no explicit reference to them would have been made in the text of the agreement. In these instances, the term is included independently of the parties' choices and preferences.

(ii) Identification by factual circumstances of the contractual formation

The examples explored in the preceding part of the present subsection would lead rightly to an assumption that the task of identifying the aim in a particular agreement is not limited to interpretation of its terms. Sometimes there could be important factual circumstances in which the contract is concluded that reveal in part or in whole the promisee's aim for entering into it. Then the aim pursued by him may not be explicitly implemented in the covenants of the agreement, but the factual circumstances in which it was concluded might be sufficiently decisive for identification of its immediate purpose. No reference in the terms of the contract to any of these facts surrounding the contractual formation need have been made as the parties consider the aim is so apparent that it does not need to be explicitly specified. An interesting example of a case where a non-pecuniary aim was established could be explored in relation to hiring a premise with a good view over a central avenue from which a public event was to be observed.¹⁶⁹ In the terms of the agreement no references to this solemn occasion had been made, but it was decided that the purpose for which the contract had been concluded was no other than the observation of these celebrations.

Even if the parties do not reach an explicit agreement with regard to the aim, it could still be claimed that the aim might have consensual origins. Similarly to implication of terms as a matter of fact, it could be argued that in some cases the surrounding circumstances in which the agreement was concluded are so compelling and decisive that there is no doubt what contractual aim the promisee pursued. This aim would have been known to both parties well at the time when the contract was formed. In these cases, the aim that the promisee wants to achieve would be established with great level

¹⁶⁵ [1977] A.C. 239.

¹⁶⁶ cf. e.g., Unfair Contract Terms Act 1977 or Consumer Rights Act 2015.

¹⁶⁷ cf. e.g., section 10, Consumer Rights Act 2015.

¹⁶⁸ cf. e.g., section 13, Consumer Rights Act 2015.

¹⁶⁹ cf., e.g. *Chandler v Webster* [1904] 1 KB 493.

of certainty due to the conclusive circumstances of the particular case. This was confirmed in a number of cases regarding the coronation of King Edward VII.¹⁷⁰ In other instances such specificity would not be achievable, but this should not represent an obstacle for identifying a more general contractual aim, based on the circumstances in which the agreement was concluded. This may be even easier today where parties tend to conclude more detailed contracts, containing more information from where the contractual aim could be identified. Thus, the train companies in Great Britain collect information about the purpose of each trip.

(iii) Identification by nature of the contractual subject matter

The contractual aim might also be derivable from the nature of the covenanted subject matter. In many cases despite the lack of any explicit or implied stipulation with regard to the aim that the promisee pursues with the agreement, there would only be one apparent goal that he would be able to achieve with the performance. This would provide a sufficient level of certainty for determination of his contractual aim. In such cases this aim need not have been explicitly agreed by the parties and it might not be assumed that the promisor would have ever objected to it. In many cases there would not be any alternative motivation for the promisee's desire to obtain the contractual subject matter apart from achieving one specific aim with its receipt. In such instances the identification of the aim would be established after the formation of the agreement, based only on the individual features and properties of the covenanted subject matter.

Thus, in *Hobbs*¹⁷¹ there is no information that at the time when the promisee bought the railway ticket, the promisor had been informed of his final destination or of any other details with respect to his further travel plans. Nevertheless, it was later held by the court that the aim of the obligation was to convey the promisee and his family to a place from where they could have walked to their house. In deciding so, the court would have been led by the essence of the contractual subject matter. A railway journey at a later time of the evening towards a residential suburban area could prompt the conclusion that the aim which the promisee pursued was to be transported to a closer location from where he would have been able to walk to his house or to a place where he could spend the night. Such a conclusion was established despite the lack of any knowledge on behalf of the railway company about the specific purpose of the promisee's trip at the time of the contractual formation. An analogous assumption would have been reached if the trip was undertaken in the opposite direction at earlier hours of the day when it would be apparent that the promisee would have wanted to reach a certain destination where his planned daily engagements were.

There are two possible approaches to contracts where no conclusive information about the specific aim could be derived from their terms alone. If an agreement for a railway transportation service to the airport is concluded, it could be construed that the promisee would like to arrive at that destination within the time promised by the carrier. It would also be conceivable that the promisee wants to undertake this trip for some particular reason. Although such a motive would not be typically communicated to the promisor and therefore would not be an explicit part of the agreement, he would have known that the other party would not use the transportation services *per se*, but because of some further benefits that it would convey to him. In this instance the contractual aim might be of various nature – the promisee could want to

¹⁷⁰ *cf.*, e.g. *Griffith v Brymer* (1903) 19 T.L.R. 434.

¹⁷¹ *Op. cit.*, at 112.

catch a flight, to observe the construction of a new runway, or even just to enjoy the particular railway journey because of the picturesque views that the railway line to the airport offers. However, in all circumstances, these further benefits exist and should be taken into consideration when the promisee's contractual interest is examined. Without them, the promisee would not be willing to conclude the contract at all. In order to be identified, the aim of the obligation is to be explored from an objective perspective, as it might be reasonably derived from all circumstances in which the contract is formed and in view of all of the provisions that have been covenanted between the parties.

In doing so the court would not add any additional content to the agreement that the promisor had not been aware of at the time when the contract was concluded. It will merely specify the particular aim of the obligation, which the promisor reasonably supposed to exist. His presumed knowledge is based on the circumstances in which the contract was concluded or the properties and qualities of the subject matter that he agreed to provide. Similarly to *Hobbs*, it could be supposed that the promisor should have agreed or should have been aware of any contractual aim that was reasonably derivable from the nature of the contractual subject matter at the time when the agreement was formed. This conclusion could be derived from the concept of aim as an immediate result which is achievable once the promisor delivers the stipulated performance. When the subject matter is agreed, the number of possible aims that can be attained after its performance is limited. A railway journey to the airport cannot be undertaken so that an aesthetic pleasure of observing an artistic object is gained. Similarly, when a portrait is commissioned, there is a limited number of aims that could be pursued with it but observing the construction of a new runway is not one of them. Furthermore, should the promisor want to limit the scope of the aim, he might have done so by an explicit contractual term. There are particular examples where some railway companies inform their passengers at the time when the contract is concluded that the views from certain seats on their trains are restricted.

It is clear that when the contractual subject matter is agreed, the promisor should be aware that the other party would need that subject matter in order to exploit some of its beneficial features. The promisee should be free to choose which of these beneficial features he would like to use – he is equally free either to enjoy the aesthetic features of a particular painting that he had commissioned or to preserve a fond memory of a dear family moment that had been captured in that same painting. The fact that at the moment when the agreement is concluded this specific purpose is not known by the promisor, does not affect its existence in any way. This existence would never extend the contents of the obligation beyond the terms that would have been agreed between the parties initially. On the contrary, the promisee's pursuit of his contractual aim would lead to narrowing of the actual objective of the obligation and will therefore exclude from its contents the other possible aims that could conceivably have been pursued by the promisee when the agreement was concluded. In such cases the promisor's liability is diminished as the other party would not be using all feasible properties and qualities of the stipulated subject matter which would lead to the alternative aims that the promisee would choose not to pursue. On the other hand, should the promisor wish to limit his liability to certain aims initially at the time when the agreement is formed, he could always do so by a specific contractual provision.

(iv) Alternative ways for identification of the contractual aim

There could be an alternative analysis of the cases where the terms of the agreement, the surrounding factual circumstances or the contractual subject matter cannot provide conclusive information for identification of the specific aim pursued by the promisee. In these cases, it could be accepted that the aim is not an element of the contents of the agreement. This would not mean that the promisee pursued no aim at the time when the contract was concluded. On the contrary – he, as argued in the preceding parts of this thesis,¹⁷² would always wish to obtain the contractual performance for a specific objective. The fact that this is incorporated in the agreement or is not conclusively derivable from it, does not in any respect reduce the importance of the aim that he pursues. The fact that the aim may not be explicitly agreed between the parties does not make it non-existent. The promisee would not be interested in receiving the contractual performance *per se*, but he would always want to use some or all of its beneficial qualities or properties as they were covenanted with the other party. This is so, as the nature of the subject matter, understood as the stipulated contractual result due to the promisee,¹⁷³ excludes the feasibility of its mere obtaining without pursuing of any further aims with it.

The promisor may agree implicitly or unwittingly not to limit the feasible ways in which the contractual subject matter might be used. This would happen if there is no covenant specifying that the subject matter might be used for certain aims only. If he wants to narrow the number of aims, he would restrict explicitly the feasible ways in which the stipulated contractual result could be exploited. If he chooses not to do this, he ought to be obligated to deliver the performance as covenanted and enable the promisee to fulfil any aim that would be consistent with the beneficial qualities and properties of the promised contractual benefit. Thus, a railway company operating services to an airport terminal should not be able to object that it was not aware of its customers' plans to continue their onwards journey by plane and therefore prevent them from establishing their suffering of non-pecuniary losses as a result of their delayed or cancelled trip. The importance of the aim with respect to the promisee's contractual interest is not changed in any way by the fact that such an aim is not included in the text of the contract. The promisee should be able to pursue any aim of his choosing and this cannot be prejudiced on the fact that no explicit agreement with regard to this exists. The promisee's ability to select which conveyable aim he wishes to pursue cannot affect the interest of the other party as any of these aims would be achievable if the promised contractual subject matter is provided as agreed. All of these aims are a consequence of the beneficial qualities of the performance as it was stipulated by the promisor at the time when the contract was formed.

The lack of a provision about this aim in the terms of the agreement does not affect the importance of the aim as an element of the contractual interest alongside the covenanted subject matter. Although the nature of the promised contractual result in some cases presupposes the existence of more than one aim, the promisee can choose to pursue some of all possible aims so long as this choice was possible at the time when he enters into the agreement. As suggested earlier,¹⁷⁴ it would be entirely irrelevant if the promisor is in fact aware of any such aims, provided that they could be achieved as an immediate result of the promised performance. If the aim that is pursued at a later moment is attainable as an outcome of the performance, then the promisor should not be able to object that he was not explicitly aware of it. He agrees to provide the contractual subject matter with such specific qualities and features that lead to achievement of

¹⁷² *cf.* the present chapter, section B, subsection b, part i.

¹⁷³ For the concept of subject matter as a result, *cf.* the present chapter, section C, subsection c, part iii.

¹⁷⁴ *cf.* the present subsection, part iii.

this aim. Should he want to limit his liability to fulfilment of specific aim only, he must do so by inclusion of a special provision to this effect in his agreement with the other party.

It should be noted that although the present work is the first scholarly research that establishes a general concept of contractual aim, there are a number of cases and statutes where the purpose for which the promisee obtains the stipulated contractual benefit is considered to have some legal implications. It is established¹⁷⁵ that in contracts for sale of goods the contractual subject matter should be fit for all usual purposes, and in addition to this, for all other purposes that were explicitly agreed between the parties. If at the time when the contract is concluded its purpose is impossible, it would be considered to be void due to common mistake.¹⁷⁶ This outcome would occur despite the fact that the contractual performance is entirely possible. If such impossibility occurs after the contractual formation, then the contract would be considered to be frustrated. Notwithstanding these fragmentary examples of the relevance that the contractual aim might have for the effects of the agreement, no authors have studied its general importance with regard to the promisee's contractual interest.

Conclusion to subsection a

These few illustrations also support the understanding that the promisee would never be interested in receiving the subject matter of the obligation *per se*. He would rather use the beneficial qualities that it would provide, which will vary pursuant to the nature of the contractual subject matter – aesthetic pleasure derived from observation of a painting, usefulness of clothing or transportation to a certain place. There are a number of ways in which the contents of the contractual aim can be identified. In some cases, it will be agreed by both parties at the time when they conclude the contract. If there is any uncertainty with regard to the scope of the result that the promisor is obliged to provide – the subject matter of the obligation – and the outcome that the promisee would like to obtain from the performance – the aim of the obligation, then this gap could be filled by a meticulous analysis of the terms of the agreement. Even if there is no direct information about the aim that the promisee would pursue when the agreement is concluded, the aim may be derivable from an objective interpretation of the contractual terms, the circumstances in which it is concluded or the essence of the contractual subject matter.

Even so, sometimes the parties to a contract will not have reached an agreement about the aim that the promisee would pursue with the stipulated subject matter. This would not in any manner undermine his contractual interest. He should always be able to establish that he has suffered non-pecuniary losses if the aim that he wanted to attain with the contractual performance would have led to something other than a mere enhancement of his financial position. In that respect the fact that the promisor might not be aware of such an aim should not pose any limitation with regard to its identification. It would suffice if the aim that the promisee wants to achieve is an immediate outcome of the contractual performance and is feasible at the time when the contract was concluded. The contractual aim is a consequence of the beneficial qualities of the promised subject matter to which both parties agreed. Therefore, even in cases where the aim

¹⁷⁵ *cf.* Sales of Goods Act, 14 and *Anson, op. cit.*, at 176.

¹⁷⁶ *cf.* Chitty, *op. cit.*, para 3-019.

is not explicitly agreed in the terms of the agreement, its consensual origin could be established from the nature of the promised subject matter.

(b) Non-pecuniary contractual aim and contractual subject matter

Introduction to subsection b

The nature of the aim that the promisee pursues with the contractual obligation defines the types of losses that would be inflicted in case of breach. If the immediate result of the performance leads to some beneficial consequences besides an enhancement of his financial position, then the harms which result from the breach will have non-pecuniary essence. The first section¹⁷⁷ of the present chapter examines this position from a more inductive perspective, employing analysis of the leading cases that provide some basis on which the origin of non-pecuniary losses could be traced. The purpose of the present subsection is to explore whether there are other elements from the structure of the contractual relationship that could in any way define the aim and thus predetermine the type of harms. The first possible element that could do this is the promised benefit. The following analysis will examine if there are specific circumstances where particular contractual subject matter could predefine the aim that is pursued by the promisee and thus lead to a specific type of loss.

The contractual aim is the immediate result that the promisee pursues with the performance. The relationship between the contractual subject matter and the aim is causal – the aim of the agreement could be achieved if the performance is rendered as promised. A more detailed examination of the causation in contract law¹⁷⁸ or in English law in general¹⁷⁹ is beyond the scope of the present work, but an exploration of the degree to which the contractual subject matter might determine the extent and contents of the aim is necessary in order to understand if there is any other element of the contractual obligation that could define what types of losses would be inflicted in case of non-performance. In the present chapter the causality will be understood more generally, as a specific connection that exists between the contractual subject matter and the aim, that both form the promisee's contractual interest. Such a dependency would explore the way in which the stipulated contractual result alone or in conjunction with other causes would lead to attainment of the aim. While the purpose of the previous subsection has been to define the sources from which the aim might be identified, the present one will explore the extent to which the promised contractual benefit could determine the contents of the aim and thus define the nature of the promisee's contractual interest indirectly.

The present subsection is divided into four parts. The first one studies the correlation between the contractual subject matter and the aim and provides further details about the manner in which the subject matter can predetermine the contents of the aim. The second part explains the mechanism which leads to attainment of the aim. It examines the processes that occur in the contractual relationship after the performance which lead to achievement of the aim. The third part describes the changes that occur in the structure of the agreement after the attainment of the aim. The last

¹⁷⁷ cf. the present chapter, section A, subsection a, part i.

¹⁷⁸ cf. Chitty, *op. cit.*, para 26-058 *et. seq.*

¹⁷⁹ Hart & Honoré, *Causation in the Law*, 2nd edn (1985).

part examines if there are instances where specific subject matters can determine the type of losses suffered in the event of breach. It establishes firstly that there are no cases where the stipulated contractual benefit might cause pecuniary losses only. It then explores other contractual subject matters and concludes that they cannot lead exclusively to non-pecuniary harms. The purpose of the last part is to demonstrate the decisive importance of the aim with regard to the nature of the promisee's interest and the inability of the covenanted subject matter to determine the type of harms suffered as a result of breach.

(i) Causality between the contractual subject matter and the aim

The performance of the agreement leads to delivery of the subject matter that the promisee is due to receive. Then a particular set of other events, which are subject to examination in the present subsection, leads to achievement of the contractual aim pursued by him. The correlation between the performance and the achievement of the aim is of causal nature. It resembles the causation perceived as a method of limiting damages deriving from contractual non-performance¹⁸⁰ or from tortious liability.¹⁸¹ The delivery of the promised subject matter and the attainment of the aim happen consecutively. There is a certain amount of time between the rendering of the covenanted contractual result and the attainment of the aims that the promisee strives to fulfil. The factual circumstances in which the parties are placed after the performance and after the achievement of the contractual aim are different. The fulfilment of the contractual aim results in a new set of facts that is dissimilar to the one which exists at the time when the performance is rendered. If an artist promises to paint a family portrait, at the time when he performs the contract, two separate legal incidents will occur. The first one will be the delivery of the portrait itself and the second one – the feasibility of the commissioner of the painting to have a memorable depiction of his family member who would have been painted as stipulated. Both parties to the agreement will be in different factual positions at the time of the performance and at the time of the achievement of the contractual aim.

Despite that, both facts – the performance and the attainment of the aim, derive from identical factual origin. They are both rooted in the formation of the contract, whose performance leads to delivery of the covenanted subject matter and then a further set of events leads to achievement of the aim. The only premise that is required for both of them is the performance of the contract. It leads directly to delivery of the promised contractual result and indirectly – to attainment of the aim pursued by the promisee. All the same, the mechanism in which this works is more complex. The performance of the contract is the delivery of the agreed subject matter. The painting of the promised family portrait and its conveyance to the promisee represent attainment of the result due by the promisor. The stipulated subject matter, in turn, leads to achievement of the aim if certain additional facts occur. At the time when the painting is delivered as covenanted, the promisee will be able enjoy the artistic qualities of the portrait if he decides to exhibit it in his reception room. This chain of events happens consecutively.

¹⁸⁰ *cf.* Chitty, *op. cit.*, para 26-066.

¹⁸¹ *McGregor on Damages, op. cit.*, para 8-004.

The rendering of the contractual subject matter and the fulfilment of the aim are not identical.¹⁸² They happen consecutively, but they are also two separate incidents with distinctive legal consequences. The parties to the contract are in disparate factual position as a result of the performance and when the contractual aim is attained. Moreover, they are affected by these two incidents differently. After the delivery of the contractual subject matter and regardless of the achievement of the contractual aim, the promisor is released from his obligation. In some cases, the promisee might not be able to enjoy the family portrait as he might have planned. Between the commissioning of the portrait and its completion, his close relationship with people who were depicted in the painting might have deteriorated irretrievably. Then the usual course of things, which would typically lead to achievement of his contractual aim after the performance, would have no such effect. Despite this the promisor's performance would release him from his liability in full. All changes that are brought about by the performance would benefit the promisor only. This is so as the promisee does not have an interest in the contractual performance *per se*, but in its advantageous qualities or effects only, which in turn are incorporated in the aim that he pursues. On the other hand, the achievement of the aim is an incident that concerns the promisee only. This is why if the promisee cannot attain his aim despite exact performance,¹⁸³ the other party is not liable at all. Even if these two incidents – performance and achievement of the aim, lead to separate legal consequences, from factual perspective the position of the parties to the contract is changed only once. The performance benefits the promisor only so far as he is released from his duty, while the attainment of the aim benefits the promisee who is never interested in the mere delivery of the stipulated subject matter.¹⁸⁴

Thus, in *Hobbs* the promisee was entitled to be transported to a certain railway station and this was the obligation which the promisor had to perform. Nothing further than that was expected from the promisor and should the promisee and his family had been carried to their desired destination, they would have been able to achieve their contractual aim – to be at a certain place from where they could have walked to their house. The performance of the contractual subject matter, which is the boundary of the promisor's duties in the agreement, provides an opportunity for achievement of the contractual aim automatically. However, the promisor benefits as a result of the transportation of the promisee and his family to the stipulated station. This would lead to its discharge from its contractual obligation. In other words, the legal position of the promisor is altered after the performance. The situation with the other party is different. The only benefit that the promisee would gain from the agreement would be if he and his family were able, as a result of the performance, to walk to their house.

Similar conclusions could be reached if other cases are explored too. The promisee concludes an agreement as he should want to use some or all of the beneficial qualities of its subject matter. The subject matter that he would receive may vary incredibly – from obtaining the ownership of a valuable painting, making a telephone call to a relative or having his car repaired. It could not be otherwise, as the principle of freedom of contract allows for liberty at choosing the subject matter of the agreement.¹⁸⁵ All of these contractual subject matters would have no value to the promisee if there was not any further aim that he would obtain as a result of them – enjoying the artistic qualities of the painting,

¹⁸² The distinction between contractual aim and subject matter has already been explored in the previous section with regard to the origin of non-pecuniary losses, *cf.* the present chapter, section B, subsection b, part i.

¹⁸³ For further analysis of these cases, *cf.* the present chapter, section C, subsection b, part ii.

¹⁸⁴ *cf.* the present chapter, section B, subsection b, part i.

¹⁸⁵ There are certain limitations to this principle, *cf. supra* note 151.

communicating with his relative or using his car for transportation to any places he desires. In all these instances the contractual aim is achieved when, as a result of the performance, the promisee is able to access some of the purported beneficial qualities of the contractual subject matter.

(ii) Mechanisms for attainment of the contractual aim

The contractual aim is the outcome of the stipulated performance as seen from the perspective of the promisee. This is the promisee's perception of the contractual result in view of its beneficial qualities or effects at the time when the agreement is concluded. The delivery of the contractual subject matter is not a separate circumstantial outcome of the performance and it does not lead to subsequent alteration of the promisee's position apart from the one that would have been evoked by the performance. The performance aims to make a specific change, or as it will be put later in this work,¹⁸⁶ to lead to a particular result. This contractual result, which represents the performance as agreed between the parties and provided by the promisor, is in itself merely an alteration in a certain factual situation. The attainment of the contractual aim does not lead to a subsequent change in the factual circumstances beyond those which would have already been brought about by the performance. The aim is achievable without any further assistance on behalf to the promisor, but in many cases, deepening on the causal relationship between the provision of the contractual result and achievement of the aim, further events might be needed.

In *Watts* the promisees were entitled to receive a survey containing information about the possible costs of refurbishing a property. The contractual subject matter – preparation of this survey – would have provided a certain alteration in the factual circumstances from the position in which they were at the time of the contractual formation. This change consisted in a delivery of the requested information by the promisor and provided an opportunity for the promisees to achieve their aim – ability to decide if the property that was subject to the survey was suitable for their needs. If the contractual performance had been provided as promised, it would have consisted of an alteration in the factual circumstances that would have allowed for achievement of the purported contractual aim should the promisees decide to buy the property in reliance on the contractual result. The additional acts that they were supposed to perform were not an element of the agreement and were something which was outside of the promisor's control. Thus, he would have been released from his obligation once he performed the agreement as stipulated. The performance, which was the delivery of the survey, and the aim, which was the ability to take a decision with regard to the suitability of the property to satisfy their specific needs, were two different things. The promisor was obliged to provide only the former. But the delivery of the contractual subject matter would have brought such a change, that the contractual aim would have been achievable as a result of the performance.

Similar conclusions would be drawn if *Jarvis* is analysed from this perspective. The subject matter of the agreement was a holiday with specific features and the aim that the promisee wanted to achieve was to have a pleasurable time as a result of the performance. The delivery of the stipulated result brought some alterations to the factual circumstances in which the parties were at the time of the contractual formation. If the promisee had received the covenanted welcome

¹⁸⁶ cf. the chapter 3, section 4, subsection a, part i.

party on arrival, afternoon tea and cakes for seven days, Swiss dinner by candlelight, a fondue party, and a yodeller evening, he would have been able to achieve his aim. The fulfilment of the aim is a consequence of the performance. The promisee would have experienced the joyous time that he aspired to, if these promised features of the subject matter of the agreement had been delivered, and nothing beyond them on behalf of the promisor would have been needed for achievement of the pursued aim.

This change in the factual circumstances is limited. The role of the promisor is to provide the covenanted subject matter. The further alterations to the promisee's factual position which lead to achievement of the contractual aim are immaterial to the promisor. This is a consequence of the manner in which the parties design their contractual relationships. The role of the promisor is merely to confer the stipulated contractual result – the subject matter of the obligation, but nothing further than that. The new state of affairs that is created by the performance is a change that is brought about by the promisor, but he is not concerned by its further effects that might lead to fulfilment of the other party's aim. The promisor's role is limited to providing that result, but nothing beyond that. It is up to the promisee, third parties or other supervening events that the contractual aim is achieved.

A promisor may agree not to play piano during certain hours of the day under a contract with his neighbour, who aims to ensure that he is able to rest undisturbed. The result that the promisor is obliged to provide would create an alteration of the situation that would typically or potentially occur if no contract had been concluded – the promisor would, or might, as typically, play his piano. From a factual perspective, the performance of the contract would be a detriment to the promisor. Furthermore, the attainment of the contractual aim, could not benefit the promisor beyond his release from the contractual performance that he is obligated to provide to the other party. The opposite is true for the other party. The only person who could enjoy the effects of the performance is the promisee who would be able to get some repose as a result of the silence kept by the neighbour.

In the same way, in *Farley* the promisor was obliged to provide a survey which was supposed to contain answers to certain queries that were of interest to the promisee. Apart from the effort that the promisor was supposed to make in order to deliver the covenanted contractual result, he was not affected by the changes that were brought about as a consequence of his performance. These alterations would have allowed the promisee to achieve his contractual aim – to decide if the property that was subject to the survey was suitable for the purposes for which it was going to be purchased. These outcomes of the performance did not in any of its possible effects concern the promisor. The fact that the promisee would use the answers that had to be provided in the survey to decide about a prospective purchase of a property does not affect the delivery of these answers at all. This in turn, demonstrates the nature of the relationship that exists between the contractual subject matter and the aim. The function of the contractual subject matter is to create a certain change that would affect the promisee only. It might be said that the contractual performance itself induces these new effects that did not exist before it. The ability of the promisee to decide if the property was suitable for his needs is created as a result of the contractual subject matter and it is something that could not benefit the other party.

(iii) Consequences of the attainment of the contractual aim

The performance of the contract creates merely an alteration of the factual or legal circumstances and provides an opportunity for the promisee to achieve his purported aim. This alteration constitutes a new factual status, or in cases of negative covenants, requiring abstaining from a certain activity – preserves the old factual status, with its own particular characteristics which did not exist before the performance or which would cease to exist but for the performance. The contractual subject matter is solely a trigger which brings about this altered state of affairs. The new factual situation is characterised by certain features, properties or particularities which did not exist before the contractual performance and which provide a new environment where the contractual aim could be attained. The contractual subject matter does not appear to have any relevance to the promisee apart from being able to convey this alteration. Its functions are limited to creating this new medium where the contractual aim is achievable. The promisee should not be interested in the process of changing *per se*, which is attained with the contractual performance. His interest lies entirely in the result that follows from the performance – this altered factual situation. The performance might be described as a vehicle or an instrument that brings about the desired alterations with their purported features which are beneficial to the promisee and which can lead to achievement of his contractual aim.

A previous example would illustrate this position well. The promisor might be obliged not to play piano during certain times of the day. The performance of such a contract would create an alteration of the factual circumstances which should benefit the promisee. The beneficiary of the contractual performance would not be interested simply in the promisee's forbearance of playing at his piano, but from the new factual state of affairs through whose advantageous properties he could achieve the pursued contractual aim. A similar analysis could be adopted to all other cases too. In *Ruxley* the promisee wanted to have a swimming pool with a specific depth so that he is able to enjoy the altered situation that would be created after the contractual performance. He was not interested in the construction of this pool *per se*, but in its ability to provide him conditions for safe diving. The performance only brought about a certain change in the factual circumstances of the promisee which contained particular features that were beneficial to him.

If the relationship between the contractual aim and subject matter is explored in that regard, it is much easier to apprehend the principle on which the distinction between pecuniary and non-pecuniary losses may be drawn. The performance, if viewed separately from the attainment of the contractual aim, results only in alteration of the factual circumstances of the promisor. The conferment of the contractual subject matter does not affect the position of the other party. This happens only as a consequence of the fulfilment of the aim that he endeavours to achieve. Therefore, a comparison between the promisee's position at the time of the contractual formation and at the time of the performance would never be able to identify any changes. This is why if only the effect of the contractual performance is explored, it is not possible to determine whether the promisee could suffer any non-pecuniary losses. His position would not have been changed following the delivery of the covenanted subject matter. This happens only as a result of the fulfilment of his contractual aim. Then his position is altered and its comparison with the state of affairs in which he was at the time of the contractual inception is possible, and it might be assessed if such an alteration comprises something else apart from an increase in his patrimonial wealth.

In *Watts*, the positions of the promisees when the survey was completed would not have been changed at all. At that moment it was not possible to assess the nature of the beneficial outcomes that they had pursued with the agreement.

The survey does neither lead to enhancement of their financial position nor does it provide any other non-pecuniary value to them if we do not look at the aims that they had pursued at the time of the contractual formation. When, on the other hand, these aims are taken into consideration, it becomes possible to determine how the performance affects the promisees. If a contract for a transfer of property is examined, similar conclusions could be made. It is not possible to determine the effects of this transfer on the promisee's position if his contractual aims are not known. Thus, even if he buys a substantial plot of land, it might occur that this does not enrich him at all. It could be imagined that there might be strict planning rules which limit the usage of the land significantly and make its market value close to nil. Despite that, the promisee might have bought it in order to preserve the wildlife that could be found on it. Therefore, the transfer of the land itself does not convey any information about the manner in which he is affected by the performance if his contractual aims are unknown.

(iv) Nature of the correlation between the subject matter and the aim

The content of the contractual aim is a question of fact and it can be established separately in each case. However, it may appear that the feasible contractual aims are dependent on the nature of the promised benefit. Hence it is interesting to examine if there are some types of contractual subject matters which include a certain list of feasible aims that would lead only to enhancement of the financial standing of the promisee. Although this question has no impact on the general principle of distinction between pecuniary and non-pecuniary losses,¹⁸⁷ its examination is important in relation to the possible scope that the non-pecuniary losses might have. One of the features of the present analysis is that it adopts a much wider general notion of these losses. A concise exploration of the limits that certain contractual subject matters might represent in this respect can provide further instances of the multitude of cases where non-pecuniary aims might be pursued.

One of the examples which has been provided previously might suggest that the aims the promisee may endeavour to achieve extend only to enhancement of his financial position. If the contractual subject matter represents some form of accumulation of monetary value, and therefore the aim that the promisee would endeavour to achieve is to accrue this financial value, then there might not be any additional feasible aim which could be qualified as having a non-pecuniary nature. This would be the case where a gold bar is purchased, or any other financial instrument is obtained in view of its potential to accumulate and accrue financial wealth. These contractual subject matters represent pecuniary value only and they do not provide any additional benefit to the promisee apart of the nominal value that the amount will inevitably and interchangeably bear. In a contract where an amount of money is due it might appear that the promisee could never obtain something more than the mere monetary equivalent of the nominal value that is promised to him. This does not seem to lead to any additional benefits of non-pecuniary nature.

In many cases such contracts contain no non-pecuniary aims, but there might be some exceptions where the payment liability could be related to pursuit of non-pecuniary aim. This might happen in an agreement for a personal bank loan, which is usually provided for a specific purpose, e.g. for obtaining of a particular chattel or service. Then if the lender

¹⁸⁷ cf. the present chapter, section A, subsection b, part *ii*.

does not provide the promised amount of money, the borrower might be unable to acquire the purported item and, depending on its nature, he might suffer non-pecuniary losses. Moreover, it would not be untypical if the borrowed amount was provided for procurement of an expensive piece of art, the purchase or repair of property in which cases the promisee will have a non-pecuniary contractual interest. In such instances the promisee's aim would be explicitly stipulated in the agreement where it would be stated that the borrowed amount should be used necessarily for a specific non-pecuniary aim.

Even in cases where the contractual subject matter has entirely monetary essence, the promisee might pursue a non-pecuniary aim with it. This may be explained on the specific dependency that exists between the aim and the subject matter. The alteration of the promisee's position resulting from the contractual performance would lead to an accumulation of money or value in the form of financial instruments. They could be intended for various purposes, including for some with non-pecuniary nature. Thus, gold bars might be bought for their purity and the metal could be intended for other purposes like manufacturing of gilt works of art. Yet the promisee might establish that from the terms of the agreement or from the circumstances in which it was concluded a certain non-pecuniary aim was pursued, as set out in the previous subsection.¹⁸⁸ The aim may either be agreed between the parties or follow necessarily from the nature of the promised contractual benefit. This does not prevent the promisee from pursuing non-pecuniary aims even in cases where the covenanted contractual benefit is of entirely monetary nature.

This conclusion should support the general principle established earlier¹⁸⁹ that the contractual subject matter is not relevant in determining the nature of the losses that may follow from breach. This principle ought to be explored from one further perspective – whether there are certain contractual subject matters whose non-delivery might cause only non-pecuniary losses. It might be thought that this question has been answered in part by the courts where it is submitted that if 'a major or important object of the contract is to give pleasure, relaxation or peace of mind',¹⁹⁰ then the non-pecuniary losses that are caused, are recoverable. Nevertheless, this does not mean that in such cases pecuniary losses cannot be caused. The case where the promisor agrees not to play on his piano during certain times could provide a suitable example. It has been suggested that the beneficiary of the obligation would receive an opportunity for a repose which would represent a typical non-pecuniary aim. But the agreement might be concluded in other circumstances too. The promisee could have another arrangement with a third party, who agreed to pay him a certain amount of money should he negotiate this undertaking with the other party to the contract. The third party might not be able to procure the contractual benefit from the promisor directly for various reasons – he may not be in a good relationship with the promisor, he may not speak his language, or he may not wish to communicate with him at all. In these circumstances the promisee would pursue no non-pecuniary contractual aim. The alteration of his position – the silence that would be kept during the stipulated time – is a type of commodity that would be sold to a third party. The aim of the promisee is to enhance his financial position by obtaining a certain remuneration. There are other instances where a contractual subject matter which aims to provide pleasure, peace of mind or relaxation could be used as a commodity and thus serve

¹⁸⁸ *cf.* the present section, subsection *b*, part *i*.

¹⁸⁹ *cf.* the present chapter, section *A*, subsection *b*, part *ii*.

¹⁹⁰ *Farley, op. cit.*, at 750.

pecuniary aims only. A painting with significant artistic value might be bought only to be sold later for profit and the promisee might not be interested in receiving any aesthetic pleasure from its likeness at all.

Conclusion to subsection b

The promisee cannot benefit from the performance itself. The rendering of the covenanted subject matter brings about only a certain change in his position that allows him to achieve his contractual aim. The performance provides only the setting in which attainment of the aim is possible. For this reason, the contractual subject matter can never be used for identification of the type of losses which are inflicted in case of breach. The performance is the key which opens the door to the premise where the promisee's aims are stored. It will never be possible to tell what is behind the closed door if it is judged by the key only. Similarly, if we look only at the subject matter of the agreement, which merely purports to provide the background for fulfilment of the promisee's aims, it does not provide any information about what these aims are. Only after the key opens the door are the contents of the room discernible. In the same way, the performance of the promisor's obligation constitutes the requisite situation in which the other party's aims could be achieved. In the same way in which a certain key can open specific doors only, a performance of a specific subject matter can lead to the fulfilment of a limited number of aims too. But it will not be possible to determine the nature of the aims only by looking at the subject matter in the same way in which it is impossible to know what is behind a locked door notwithstanding that it can be opened by a specific key only.

Mere possession of this key is not going to provide information about the contents of the room. Equally, a mere observation of the covenanted subject matter cannot determine the effects that its delivery will have on the promisee. Something more is needed. The contractual aim is this missing concept. It represents the content of the room which is unlocked by the performance and can determine the nature of the harms that are threatened in case of breach. For these reasons there can be no contractual subject matters whose non-performance inevitably leads to infliction of a particular type of harms. There is no dependency between the subject matter and the type of aim that the promisee might pursue with the performance. Although any individual subject matter may presuppose a limited number of aims only, there will always be one or more possible aims which would lead to something other than enhancement of the promisee's financial standing. In all of these cases, regardless of the stipulated subject matter, the breach may cause non-pecuniary harms.

(c) Non-pecuniary contractual aim and the parties to the contract

Introduction to subsection c

It has been suggested¹⁹¹ that the only principle which can explain the origin of non-pecuniary losses is the contractual aim pursued by the promisee. That aside, there are no further restrictions which could prevent the infliction of non-pecuniary losses as a result of non-performance. The previous subsection has examined the inability of the contractual subject matter to provide any limitations to this principle from two possible aspects. It has been established that the

¹⁹¹ cf. the present chapter, section B, subsection b, part i.

promisee can never suffer non-pecuniary harms unless he has a non-pecuniary contractual interest and that in cases when he has such an interest, the breach will necessarily threaten such harms. Now this analysis will be continued with regard to the parties to the contractual relationship. It will be asked if the type of parties could in any manner prevent them from suffering non-pecuniary losses. It will be seen if there could be some restrictions, from the perspective of corporate or contract law that might lead to the impossibility of certain parties pursuing non-pecuniary contractual aims and thus having non-pecuniary contractual interests. If it is concluded that there are no such limitations, it might be claimed that the principle of distinction between pecuniary and non-pecuniary losses can be applied universally to all contracts without any limitations in regard to their contents or parties.

There are no doubts that a natural person can suffer non-pecuniary losses. However, there might be various reasons for thinking a legal person may not be able to pursue non-pecuniary aims, either at all or in certain cases, and, therefore, not be able to have non-pecuniary contractual interests. These reasons might not flow necessarily from the nature of the contractual relationship itself but could be external to it and therefore not related to the contents of the obligation as it is formed on the basis of the agreement of the parties. The most apparent ones are limitations that might derive from the legal personality of corporations and other associations. These restrictions might be conceptual, where the nature of legal persons precludes their suffering any non-pecuniary losses at all; legislative, where the law itself does not allow them to have any non-pecuniary aims and corporate, where the company might be incorporated in a way that would not allow it to enter into such contractual relationships. Lastly, legal persons might be unable to conclude certain contracts on the basis that they are not compatible with their legal personality. This subsection will contain four separate parts which will explore in detail all these possibilities. The first one examines the existence of any feasible conceptual or legislative restrictions. The following three parts explore the limitations related to the formation, contents and discharge of contractual relationship.

(i) Restrictions on conceptual or legislative level

Companies and other such associations, as distinct from their human members, exist in a normative discourse only. Their legal personality is based entirely on the legislative regime that creates them and provides them with an opportunity to participate in legal life along with natural persons. It is immaterial if any of their features, as they might be defined by the respective legal order, do or can exist in real life. Therefore, from a social or moral perspective it would be irrelevant if a company can commit crime or can be married to another person so long as the law creates a legal regime where this is possible. Whereas the present analysis is not concerned with any external effects of the existence or other features of the personality of legal entities, it is similarly immaterial if a company or other association can in fact suffer non-pecuniary losses. The only apprehension that matters in this regard is if the law provides for any specific limitations on that broader conceptual level that might prevent their ability to be parties to contracts *ab initio* whose non-performance might cause non-pecuniary losses. Therefore, the fact that a company cannot have feelings or other interests that are in fact considered to be solely attributable to natural persons in that respect is wholly irrelevant.

It has been claimed that the only condition for the possible infliction of non-pecuniary losses is the promisee's non-pecuniary contractual interest. Therefore, it would be a mistake to attempt to establish if legal persons can suffer fright,

vexation, mental distress or disappointment. Their ability to suffer particular types of instantiations of these harms is irrelevant at least for two reasons. First, it is not likely, at least from a purely legal perspective, to create a comprehensive and exhaustive list of all types and forms of non-pecuniary losses that might result from the breach. Henceforth there is no criterion establishing a further finite list of non-pecuniary harms which could be suffered by a legal person. Instead, this position would mean that the distinction between pecuniary and non-pecuniary losses should not be based on the non-pecuniary contractual interest of the promisee, which has already been regarded as implausible.¹⁹² Second, if there are other restrictions which can in practice limit the ability of companies to suffer some particular type of non-pecuniary losses, they are not of a conceptual or legislative nature and thus they are explored in other parts of this work.¹⁹³

Non-pecuniary loss can only occur if the promisee has a non-pecuniary contractual interest. Therefore, to know if and when a legal person can suffer such losses, we have to explore whether it could have a non-pecuniary contractual interest. Following the argument of the preceding subsection,¹⁹⁴ this then supposes that the decisive query would be if legal persons can have non-pecuniary contractual aims. In other words, the question whether legal persons can suffer non-pecuniary loss reduces to the question of whether they can pursue any other contractual aims apart from enhancement of their financial position. From a conceptual or legislative perspective, it is immaterial if, beyond the normative discourse in which the corporations or other associations exist, they could pursue such aims. The scope of the purposes which a legal person can aim to achieve by a particular contract is to be assessed entirely within the limitations imposed by the law. This premise could be derived from the fictitious nature of the companies and other associations. They exist only in normative reality and therefore it needs to be seen if the law imposes restrictions on their pursuit of such non-pecuniary aims on that level. The fact that a company cannot do so beyond their normative existence would not be relevant to an assessment of its principal ability to suffer such losses.

There are no general legislative restrictions with regard to the aims that a legal person might pursue with a contract. However, there might be certain limits on a corporate level which could restrain a company from following specific aims other than those which are incorporated in its memorandum of association. This part of English company law has always been considered rather unsatisfactory for it aims to restrict the legal capacity of the company, which leads to some uncertainty and obscurity.¹⁹⁵ This has been significantly changed with some legislative interventions from the last decades,¹⁹⁶ but there are still a number of companies which have statements of objects. This requires a more detailed examination of two separate questions with regard to possible limitations that might exist on a corporate level which could lead to restriction of the ability of companies to pursue non-pecuniary aims. The first is a comparison between the notion of the contractual aim and the objects of the company. The second concerns the restrictions to the capacity of a company in respect of its objects and its possible effect on its contracts with third parties which could be considered to be beyond the scope of these objects.

¹⁹² cf. the present chapter, section A, subsection b, part i.

¹⁹³ cf. parts ii, iii and iv of the present subsection.

¹⁹⁴ cf. the present chapter, section A, subsection c, part ii.

¹⁹⁵ Bennett, D., *op. cit.*, para 2.601.

¹⁹⁶ Sections 108 to 112 of the Companies Act 1989.

Previously all acts, including contracts, which were concluded outside of the objects of a company were null and void vis-à-vis the other party.¹⁹⁷ Although the law has been changed,¹⁹⁸ there are still companies registered before these amendments where the old restrictions apply. If the notion of the limited objects of a company is explored more closely, it can be concluded that it has very similar connotation to the idea of the contractual aim. The concept of restricted objects of a company establishes a general limitation on the aims that this company might pursue with all of its acts, including contracts. However, this would not mean that if a company has chosen to have an object which is of a pecuniary nature, all of its contracts will need to pursue financial profits only. A company which runs a sports facility may organise a competition where the contestant who achieves the best result gets a reward. A company is deemed to have implied power to conclude contracts for incidental purposes which are reasonably close to its main business.¹⁹⁹ Yet, this was not the only respect in which the effects of the doctrine of *ultra vires* have been relaxed.

The statutes that companies typically adopted rarely restricted them from entering into contracts whose aim is non-pecuniary. Even during the times when companies were obliged to state their objects expressly, they found ways to ensure that they had rather wide legal capacity. In some cases a large number of various objects and powers were added to their statutes so that all conceivable objects²⁰⁰ were covered or it was simply added that the company may “carry on any other trade or business whatsoever which can, in the opinion of the board of directors, be advantageously carried on by the company in connection with or ancillary to any of the above businesses or the present business of the company.”²⁰¹ These practices, which were met with criticism and reluctance from the courts,²⁰² could not resolve satisfactorily the problems deriving from the lack of sufficient certainty of the company’s capacity. It was thought that a distinction between the objects and the powers of the company had to be made where the objects were understood as the purposes that the company was pursuing, and the powers were the specific types of relationships that could be concluded for achieving these goals. The powers therefore were understood as a much wider category which was able to extend the scope of contracts that a company could conclude additionally.²⁰³

Both cases – where a company includes long lists of objects or additional powers in its memorandum of association – provided sufficient opportunities for concluding contracts pursuing non-pecuniary aims. In addition to that, the courts also found additional ways to uphold transactions by wider construction of the objects of a company.²⁰⁴ Unless there were compelling grounds for the opposite interpretation, the courts were unlikely to consider a contract void on the grounds of the *ultra vires* doctrine.²⁰⁵ This in turn would additionally limit the exceptional cases where the company would be unable to suffer non-pecuniary losses because of the *ultra vires* doctrine. After the reform of 1989²⁰⁶ all contracts with

¹⁹⁷ *Ashbury Railway Carriage and Iron Co v Riche* (1875) L.R. 7 H.L. 653.

¹⁹⁸ Firstly by s.9 of the European Communities Act 1972 (as later consolidated in s.35 of the Companies Act 1985, now s.39 of the Companies Act 2006) and, secondly, by sections 108 to 112 of the Companies Act 1989.

¹⁹⁹ *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch. 246 at 295.

²⁰⁰ *Cotman v Brougham* [1918] A.C. 514.

²⁰¹ *Bell Houses Ltd v City Wall Properties Ltd (No.1)* [1966] 2 Q.B. 656.

²⁰² *North of Scotland, etc., Steam Navigation Co* 1920 S.C. 633; 1920 S.L.T. 176.

²⁰³ Bennett, D., *op. cit.*, para 2.617 *et. seq.*

²⁰⁴ *Simpson v Westminster Palace Hotel Co* (1860) 8 H.L.C. 712.

²⁰⁵ *Horsley & Weight Ltd, Re* [1982] 3 W.L.R. 431.

²⁰⁶ Bennett, D., *op. cit.*, para 2.630 *et. seq.*

third parties were considered to be valid regardless of any restrictions in a company's memorandum of association. Nowadays all companies can conclude any type of contract, including those which have a non-pecuniary aim and whose non-performance would cause non-pecuniary losses.

(ii) Restrictions with regard to the contractual formation

English company law does not establish any general limitations with regard to the legal personality of companies or other associations that might restrict their ability to conclude agreements with non-pecuniary contractual aims. This would not mean that there are no other rules beyond company law norms that may establish other restrictions with such an effect. Specific rules of contract law might provide for certain limitations that could prevent some parties from pursuing particular contractual aims. Contracts might be void or voidable for mistake, frustration, lack of capacity of the parties and other reasons. These instances would certainly include some cases where the parties attempted to achieve a non-pecuniary aim. The present analysis is limited to examination of cases where such restrictions are of a general nature and are established with respect to the artificial personality of legal persons. It will therefore explore if there are such general contract law limitations by reviewing the restrictions that exist with regard to contractual formation, performance and discharge and which might prevent a company or other association from pursuing a non-pecuniary aim.

In the present context the notion of contractual formation is understood widely so that it also includes circumstances that negative consent and thus prevent contractual formation *ab initio*. This would include cases where the contract could not be performed due to physical²⁰⁷ or commercial²⁰⁸ impossibility. These cases, which are considered to be types of a common mistake,²⁰⁹ need to be explored more closely as the reason for their effect might be related to the fact that one of the parties is a legal person. The distinction that has been drawn between, on the one hand, cases of physical or commercial impossibility and, on the other, cases where the contractual subject matter does not exist seems to be unclear. It is considered²¹⁰ that the subject matter of the contract does not exist where sale of already perished goods was promised. An example²¹¹ of a case where physical impossibility occurs was when the products which were promised to be transferred could not possibly be produced by the land specified in the contract. Here the notion of the contractual subject matter is not identical to the concept adopted in the present work. The former appears to be the physical object in relation to which the contractual result is promised – the transfer of a certain property right, related to that object; providing any service that would improve it or anything else that is in any manner related to that object.

By contrast, the understanding in the present analysis is that the subject matter of the contract is the performance that the promisee is entitled to receive – this could be the transfer of ownership or other proprietary right, providing some special service in relation to a material object or any other contractual result that the promisee would like to procure. Therefore, the examples of common mistake where a thing (*res*) in relation to which an obligation is assumed no longer

²⁰⁷ About the traditional understanding of this group of cases in *Sheikh Bros Ltd v Ochsner* [1957] A.C. 136.

²⁰⁸ About the traditional understanding of this group of cases in *Griffiths v Brymer* (1903) 19 T.L.R. 434.

²⁰⁹ cf. generally *Cheshire* (1944) 60 L.Q.R. 175; *Tylor* (1948) 11 M.L.R. 257; *Slade* (1954) 70 L.Q.R. 385.

²¹⁰ Peel, E., *op. cit.*, para 8-008.

²¹¹ *op. cit.*, para. 8-012

exists are merely a special sub-category of a broader group of cases where the contractual result may not be provided due to physical or legal impossibility. The reasons for such impossibility might include various circumstances, where despite the existence of the material thing in relation to which the obligation exists, performance is not possible due to the promisee being a legal person. In a contract for legal services the solicitor cannot provide freedom from molestation or other mental comfort to a company or a tailor would be unable to sew a special costume to be worn by it. Although it is clear that these cases are examples of a common mistake, the more general query that needs to be answered here is if they constitute a special group of exceptions where legal persons cannot suffer non-pecuniary losses.

The common mistake in these cases would be due to the factual impossibility of performance. The tailor cannot sew clothing for a company – legal personalities have no direct physical materialisation. The solicitor cannot provide freedom from molestation to a company – legal personalities cannot be victims of any harassment at all. The restrictions that could be established in the present analysis are related to those particular instances of non-pecuniary interests that cannot be pursued by companies or other associations not because of some specific legal restrictions, but due to the factual impossibility of pursuing them. The law provides certain safeguards that no such contracts could be concluded using the principles of common mistake. If despite the said factual impossibility a company concludes a contract where it pursues a certain non-pecuniary aim which is inconsistent with its artificial personality, such an agreement would be void. Therefore, despite the lack of any principal legal restrictions on a conceptual or corporate level which could prevent legal persons from entering into contracts where a non-pecuniary aim is pursued, there are particular factual limitations in that respect.

(iii) Restrictions with regard to the terms of the contract

It is possible that after the contractual formation the extent of the promisor's obligations is limited by other rules. This limitation may affect the other party's non-pecuniary contractual interest. The purpose of this subsection is to establish that in cases where the promisee is a company or other association there are no specific rules that could lead to a general alteration of the promisor's liability that could prevent correlatively the promisee's pursuit of non-pecuniary contractual aims. It seems indisputable that the common law rules purporting to proof, classify and construe the text of the agreement²¹² will not lead to the inability of pursuing a non-pecuniary contractual aim. It would be so as these rules do not establish any special regulations in cases where the promisee is a legal person. Thus, it is possible that a contract in standard form is not found to be incorporated in an agreement between a company and a natural person. This could in turn restrict the company from pursuing a certain non-pecuniary aim if such an aim could be derived from the standard terms. Whereas artificial persons are those who offer contracts in standard form much more commonly than others, such rules will affect them more than the natural persons. However, these limitations are not based on the special personality of the companies or other associations and do not establish a general limitation of substantive nature that affects the pursuit of non-pecuniary contractual aims. In other words, should a company wish to have its non-pecuniary contractual interest upheld, it should follow the special requirements for incorporation of terms.

²¹² cf. e.g. *Chitty on contracts*, *op. cit.*, para 13-001.

A slightly different approach is needed where implication of terms by court, custom or legislation is concerned. In these cases, it might be possible that the agreement is supplemented or amended with certain substantive provisions which could affect a party's non-pecuniary contractual interest. However, it is less certain if this could lead to a general restriction on the capacity of artificial persons to pursue non-pecuniary contractual aims. The restrictions on pursuit of a specific contractual aim could be possible if the implication of terms leads to invalidation or negation of existing provisions which in turn existed to promote the non-pecuniary contractual interest of a company or other association. Thus, if the company agrees to provide a service, there is an implied term that this will be done with reasonable care and skill.²¹³ This provision can hardly exclude the company's opportunity to pursue a non-pecuniary aim. Similar conclusions would be reached of other examples of implied terms are explored. The restrictions that are established deriving from the implication of terms are not addressed at artificial persons particularly and therefore they cannot pertain to a general bar that could prevent companies or other associations from pursuing non-pecuniary contractual aims.

A different conclusion might be reached if the rules on exemption clauses are examined. With these clauses the parties seek to absolve themselves wholly or in part from liability deriving from breach or defective performance.²¹⁴ The question then would be whether such an absolving can lead to restrictions of the non-pecuniary contractual interest of a company or other association. This could happen only if the invalidated exemption clause contains a provision that leads to fulfilment of a non-pecuniary contractual aim. Although there are cases where this is possible, such instances would not represent a general limitation on the rights of an artificial person to have a non-pecuniary contractual interest. These limitations exist not in view of the artificial personality of the party, but in order to protect certain rights of the promisee. The restrictions on exemption clauses are equally applicable to cases where the artificial person aim to enhance its patrimonial wealth and where it aspires towards other objectives. The latter instances will be more common which means that the exemption clauses in most cases will affect the pecuniary rather than the non-pecuniary interest of a legal person.

The last source that could restrict a company or other association from pursuing a non-pecuniary contractual aim is the unfair terms in consumer contracts. If a term is found to be unfair, it will not be binding on the consumer.²¹⁵ It is possible that an unfair term upholds the non-pecuniary contractual interest of the other party to the contract, which can only be a trader. In many cases this trader will be a company or other association which could be prevented from attaining its non-pecuniary aims. Therefore, it might be thought that this restrictive regime targets mostly legal persons and establishes a substantive limitation for their feasibility to pursue certain non-pecuniary contractual aims, which can be achieved as a result of the effect of the unfair terms. All the same, these limitations exist not in view of the artificial personality of the promisor. They aim to protect consumers in a limited number of cases and do not prevent companies or other associations from having a non-pecuniary contractual interest in such type of contacts. This interest could be upheld in consumer contracts if it does not derive from unfair terms.

(iv) Restrictions with regard to discharge from contractual liability

²¹³ Supply of Goods and Services Act 1982 c. 29, s. 13.

²¹⁴ *cf. e.g. Chitty on contracts, op. cit.*, para 15-001.

²¹⁵ Consumer Rights Act 2015 c. 15, s. 67.

The last principal source which might lead to some limitations on the rights of legal persons to pursue non-pecuniary aims is the rules on discharge. It might seem that in this last stage of the life of the contractual relationship no limitations to such rights might arise. This is true for the performance of the contract and for some specific forms of discharge – discharge by agreement, merger or discharge by breach where the rights of a legal person pursuing non-pecuniary aims could be exercised without any difficulties. It might be different in cases of discharge by frustration where the aim of the contract cannot be achieved.²¹⁶ There are cases where it was possible for the contract to be performed, but this would not have led to achievement of the aim pursued by the promisee. Some instances have already been provided,²¹⁷ but the possible examples are numerous. In the context of *Hobbs* if the promisee's house had been destroyed between the time of the contractual formation and performance, his contractual aim would have not been achievable. In some similar cases the contract was considered to be frustrated.²¹⁸ Although this is one of the examples where English contract law acknowledges the importance of the contractual aim *ad hoc*, it does not establish any specific requirements with regard to its nature or contents. Furthermore, it is thought that the doctrine of discharge by frustration of purpose has limited application.²¹⁹

It might be thought that in order to prevent frustration, the contractual aim should be achievable at the moment the covenanted subject matter is delivered to the promisee. The aim does not even need to be explicitly stated in the agreement so long as it could be reasonably derivable from the circumstances of the case. There is a view²²⁰ that some of these decisions might be justified not on the grounds of frustration of purpose, which leads to too great uncertainty, but on the basis that the subject matter was not possible at the time of the contractual inception. In order to justify such an impossibility, it was stated that the contractual result that the promisor is obligated to provide is not for a rent of the room, but for providing a space from where the event might be observed. Such a position is highly contentious. It is for the parties to decide what the subject matter of their agreement is. The court should not substitute their mutual agreement in order to achieve the purported result with an ostensible acceptability. Even in cases where there is a very close causal correlation between the contractual subject matter and the aim, they are always different. If it is accepted that the subject matter in the coronation cases was for providing a space for viewing of the procession, the contractual aim would still be something different than that – ability for viewing of the event. The promisor did not have any involvement in the other party's observation of the procession. His obligation was limited to provision of the premises regardless of the promisee's ability to watch the parade.

The advantages of understanding the contractual subject matter not as for the renting of a room, but for something else, are dubious. On the one hand, it does not correspond to the contents of the agreement where the parties are those who decide what the subject matter of their relationship is. From the information provided in the law reports²²¹ it seems that the text of the contract states that the subject matter was for renting of a flat in Pall Mall and no procession was

²¹⁶ Generally about the frustration of purpose, cf. Treitel, Guenter, 2014. *Frustration and Force Majeure*, 3rd edn, London: Sweet & Maxwell, para 7-001 *et seq.*

²¹⁷ cf. the present chapter, section C, subsection b, part ii.

²¹⁸ Cf., e.g. *Krell v Henry* [1903] 2 K.B. 740 or *Denny, Mott & Dickson Ltd v James B. Fraser & Co Ltd* [1944] A.C. 265.

²¹⁹ cf., Peel, E., *op. cit.*, para 19-043 and Treitel, G., *op. cit.*, paras 7-035 and 7-036.

²²⁰ Peel, E., *op. cit.*, para 19-042.

²²¹ *Krell v Henry*, *op. cit.* at 740.

mentioned at all. This premise was not chosen randomly – it was situated in a building facing one of the most central avenues in St James's in London where a parade following the coronation was planned to take place. On the other hand, the interpretation of the contractual subject matter as suggested by some other authors,²²² leads to implication of a condition which had never been agreed between the parties. It might be though that the procession was a condition for the contract remaining valid. However, the reports contain information that no such condition was agreed.

Furthermore, such an understanding extends the notion of contractual subject matter needlessly. The subject matter is the result that the promisor is obligated to provide to the promisee. If a company that runs a gallery buys a canvas by a celebrated painter, the subject matter would be the transfer of the property of that painting rather than, for example, achieving a certain number of visits in the gallery. This outcome might be reasonably expected as a possible consequence of the increased public interest, but it could in no way be considered an implied subject matter for whose non-conferral the promisor will be held liable. Lastly, the more traditional understanding of the nature of the subject matter, as reasonably and objectively derived from the contents of the agreement, does not in any way prejudice the rights of the parties in cases of frustration. If the purpose of the contract to have the painting shown in the gallery becomes impossible, then the parties could be discharged. This could happen if the building used by the gallery is destroyed by a fire.²²³

The rules about frustration of purpose confirm the importance of the contractual aim and demonstrate its distinctiveness from the covenanted subject matter. The aim is the immediate purpose that the promisee endeavours to achieve and it is the reason for which the contract is concluded. English law does not provide for any special requirements or restrictions on the contents of the contractual aim, including in cases where the promisee is a legal person. The rules of contractual performance and discharge do not establish or presuppose specific aims that cannot be pursued by the parties to a contract, even when the promisee is a legal person. In some cases, the aims which were not achievable and thus led to discharge of the whole agreement were non-pecuniary. This confirms that English contract law will generally uphold such an aim. This should be no different if the promisee is a legal person. In such cases there should be no restriction either with regard to the agreed subject matter or to the aim that is to be achieved with its performance. Any contrary rules would interfere with the principle of freedom of contract and would affect the rights of the corporations and other associations to participate in the legal life equally along with the natural persons.

Conclusion to subsection c

There are no limitations that may restrict the ability of legal persons to conclude contracts for the achievement of non-pecuniary aims. First, such restrictions would not be feasible from a company law perspective as they would lead to the accidental or ad-hoc incapacity of companies and other associations which is conceivable neither on a theoretical nor on a practical level. Legislation does not restrict the types of contracts which these legal persons may conclude. If a company has limited this on a corporate level, such limitations will not have any effect upon the other party to the contract. If the contractual subject matter which legal persons are entitled to receive turns out to be impossible due to their artificial personality, either at the time when the contract was formed or at a later stage, then the rules of mistake or frustration

²²² Peel, E., *op. cit.*, para 19-042.

²²³ *Taylor v Caldwell* (1863) 3 B. & S. 826.

apply. Nevertheless, these limitations do not represent a general restriction on companies or other associations having non-pecuniary contractual interest.

English contract law does not establish any specific restrictions in relation to the aims that the parties may pursue when entering into a contract. If the promisee is a legal person, its rights with regard to contractual formation, choice of contents, ways of performance and effects of discharge will not be altered, amended or affected in any other manner at all. There are no specific cases of common mistake or frustration of purpose where the promisee is a corporation or other association and indeed there are no merits in establishing any special rules that might control such cases. The instances where the promisee is not a natural person neither provide for any specific regime nor do they establish any particular restrictions with regard to the validity of the contract and the remedies available in cases of its breach. The promisee would have the same rights regardless of its organizational form, including in relation to its ability to pursue non-pecuniary contractual aims. Therefore, even if the promisee is a legal person, there are no specific restrictions that limit its ability to choose any particular subject matter and contractual aim, provided that all general rules of contract law, applicable to all parties regardless of the nature of their legal personality, are not infringed.

Conclusion to section B

Though the idea of contractual aim has not received scholarly attention, its existence in the parties' agreement should not be doubted. There are certain ways in which this aim can be identified. It can be agreed explicitly. This is the most natural way in which the promisee would incorporate his aim in the terms of the agreement. There are numerous examples where the parties explicitly agree that a certain outcome of the performance is to be expected. In other cases, the aim is considered to be too obvious or indisputable and explicit reference to it would have been considered redundant. The circumstances in which the agreement is concluded should serve as a sufficient source on whose basis the contractual aim can be identified. In a third group of cases the nature of the covenanted subject matter is a satisfactory indication of the aim pursued by the promisee. Lastly, the subject matter could support achievement of various aims, but none may have been explicitly specified by the parties, derivable from the circumstances of the contractual formation or identifiable otherwise. Then the promisee should be able to specify the particular aims that he pursues with the agreement.

There is a complex dependency between the subject matter and the aim. From a legal perspective, they have separate effects on the parties. If the promisor delivers the stipulated contractual subject matter, he is released from his contractual obligation in full. Then the promisee is able to achieve his aim as a consequence of the performance. Hence the delivery of the subject matter without achievement of the aim is of no use to him. From a factual perspective there is a single change resulting from the performance that varies the promisee's position in a way which allows him to attain his aim. The delivery of the agreed subject matter is a mere trigger that leads to a certain alteration of the promisee's state of affairs. As a result of this change, it could be assessed if the aim that he pursues would lead to something else apart from an enhancement of his financial position. This in turn, makes it possible to determine if the breach could cause him non-pecuniary losses. The causal relationship between the subject matter and the aim of the agreement has one further consequence. The subject matter does not predetermine the aim that is pursued by the promisee, because its

delivery will in all cases create such a new factual situation that always allows for pursuit of many feasible aims, some of which are non-pecuniary. Therefore, it can be concluded that the stipulated subject matter cannot predefine whether the promisee has a non-financial interest in the performance.

Similarly to this, the nature of the parties to the contract cannot exclude infliction of a certain type of loss. Companies and other associations have artificial personality which in many cases may prevent them from taking part in some relationships. They cannot go on a vacation or be depicted in a family portrait, but they can still conclude many other types of contracts where they might pursue various non-pecuniary aims. English law does not provide for any specific restrictions that limit the ability of companies or other associations to form such relationships in so far as the general conditions for contractual validity are satisfied. Nevertheless, there might be certain contract law restrictions that can limit legal persons' ability to conclude particular contracts. Some cases of supervening or antecedent impossibility could make the contract void or discharged. Such limitations can be explained as special instances of mistake and frustration. They do not establish any particular regime applicable to companies or other associations exclusively. This conclusion reaffirms the general principle that the only criterion that might be used to identify an agreement where non-pecuniary losses could be caused is its aim. Provided that the promisee pursues anything beyond a mere enhancement of its financial position, the breach will inflict non-pecuniary losses in all cases.

The study of the contractual aim explains the extent to which the contents of the agreement can define the type of losses that follow breach. The relationship between the nature of these harms and the subject matter of the agreement has scarcely been touched on in the legal literature and by the courts previously. No detailed examination of their correlation has been offered and no author has explained how the contractual subject matter can influence the type of losses. The concept of the contractual aim as an intermediate element between the contractual subject matter and these losses establishes the missing element that can determine what particular harms may be suffered. The exploration of the promisee's aim reveals the complex pattern in which non-pecuniary harms could be inflicted. Lastly, the perception of the aim as an element of the promisee's contractual interest along with the stipulated subject matter expresses the nature of his motivation for the contractual formation. This requires a further study of the contractual interest and the complex relationship between its constitutive elements. This is done in the following section.

C. The non-pecuniary contractual interest

Introduction to section C

It has been seen that the concept of contractual interest can serve various functions. Some authors²²⁴ suggest that it could be used as a measure of the damages payable as compensation for the losses caused by the non-performance. In the previous sections²²⁵ it was used as a criterion for distinguishing pecuniary and non-pecuniary losses. Further in this work²²⁶ the classification of non-pecuniary losses will also be based on it. When the contractual interest was explored in

²²⁴ *cf.* Chitty, *op. cit.*, para 26-022 and the literature referenced therein.

²²⁵ *cf.* the present chapter, section A, subsection c.

²²⁶ *cf.* chapter 3, section B, subsection c.

the previous sections, it has been argued that it includes both the contractual aim, defined²²⁷ as the immediate purpose that the promisee endeavours to achieve with the receipt of the promised performance, and the contractual subject matter, which is the stipulated contractual result that the promisor is obligated to provide to the other party.²²⁸ In the previous section²²⁹ it has been seen that the performance leads to fulfilment of the promisee's contractual aims subsequently. This section explores the contents of the promisee's interest in view of its two constitutive elements and the interactions between them.

Although there are some general works on English²³⁰ and foreign law²³¹ that explore the promisee's performance or expectation interest, they usually use this concept as a measure of the damages payable as compensation for his loss. Their analyses are therefore confined to the appropriateness of this model for providing an adequate redress in cases of breach. Other authors²³² have examined the importance of the promisee's interest in receiving the stipulated contractual benefit rather than compensation for its non-delivery. Despite their progressive perspective which consider the importance and the meaning of performance as opposed to the right of damages, these accounts have remained isolated. In the main textbooks²³³ on English contract law the expectation interest is seen in a fairly conservative manner, only as an instrument for the assessment of damages due in order to provide a certain level²³⁴ of compensation for the losses suffered as a result of breach.

The present section will address this gap in the legal literature from two perspectives. It will explore the promisee's contractual interest as it could be assessed independently of breach. It is certain that at the time of contract formation the promisee has a particular interest in receiving the contractual subject matter and in achieving his aim, rather than simply being entitled, under specific subsequent conditions, to be compensated for some of the losses that he would suffer in case of breach. The comparison of the promisee's position before and after non-performance, in view of his entitlement to damages, will be made at a later stage²³⁵ of this work as well. The purpose of the present section is to examine the promisee's contractual interest not merely as an aggregation of its two constitutive elements – the subject matter and the aims of the agreement. Rather, it will explore how their correlation determines the advantageous position in which the promisee is placed as an outcome of performance. Therefore, the main research question of the present section is to identify in which circumstances the promisee has a non-pecuniary interest and what its content is.

The analysis will be divided into three subsections. The first one argues that some previous concepts which perceive the contractual interest as being restitutionary or reliance-based do not represent its true nature and should be rejected in

²²⁷ There are other definitions of the contractual interest, *cf.* the present chapter, section A, subsection c, part *iii*.

²²⁸ For other views on the contractual subject matter, *cf.* Peel, E., *op. cit.*, para 17-001 and 17-049.

²²⁹ *cf.* chapter 2, section C, subsection b, part *iv*.

²³⁰ Campbell, D., 2015. Better than Fuller: A Two Interests Model of Remedies for Breach of Contract. *Modern Law Review*, 78 (2), 296–323 and Friedmann, D., *op. cit.*, at 628-654.

²³¹ *cf.* Fuller, L.L. and Perdue, W.R., 1936. The reliance interest in contract damages: 1, *The Yale Law Journal*, 46(1), at 52 and Fuller, L.L. and Perdue, W.R., 1937. The reliance interest in contract damages: 2, *The Yale Law Journal*, 46(3), at 373.

²³² *cf.* Webb, Charlie, 2017. Performance Damages, *op. cit.* at 205 *et. seq.*

²³³ Chitty, *op. cit.*, para 26-022.

²³⁴ There are further limits to the compensation, *cf. e.g.*, Chitty, *op. cit.*, para 26-066 *et. seq.*

²³⁵ *cf.* chapter 3, section A, subsection c.

cases where the promisee pursues non-pecuniary aims with the agreement. The second subsection examines the general contents of the non-pecuniary contractual interest as conceived from its two formative elements: the stipulated subject matter that the promisor is obligated to provide and the aim that the promisee endeavours to achieve with the performance. This perspective demonstrates that seeing the interest as comprising the subject matter and the aim provides much more convincing answers to a number of questions that troubled the legal theorists. The third subsection analyses the non-pecuniary interest beyond the aim that the promisee pursues with the performance. It explores the consequential non-pecuniary interest that he has along with his immediate contractual aims. It also introduces a distinction between the promisee's interest in achieving the contractual aim pursued with the performance and any further interests that he might have beyond this.

(a) Non-pecuniary contractual interest and contractual subject matter

Introduction to subsection a

At the time of contract formation, the conferral of the stipulated subject matter and the consequences following from this is the only interest that the promisee has. At this moment he has no interest in receiving damages or other forms of redress at all. It has been submitted²³⁶ that, in cases when the promisee pursues a non-pecuniary aim, his interest is non-pecuniary. Furthermore, it has been suggested that this is the only principle by which it is possible to identify the contractual relationships where non-pecuniary losses might be caused.²³⁷ The following analysis will explore the contents of this interest at the time the contract is concluded. This perspective has not been a subject of specific scholarly examination. Some authors²³⁸ have seen this interest as a measure which can determine the scope of non-pecuniary losses, but no work includes a description of the content and the nature of this interest before breach. Other authors' analyses cover the interest only retrospectively, seeing it as merely a tool which quantifies the compensation that is due to the promisee. All the same, his interest in the contractual performance does not need to be related to the remedies that might be available to him in case of breach. The significance of his interest should be sought in its ability to express the overall advantage that the performance could provide to him. This in turn ought to serve as a criticism of the unjustifiably narrower understanding of the functions that agreements are perceived to serve in English contract law. It is thought that they exist in order to facilitate the economic turnover²³⁹ and that the contractual interest could not comprise of something more than the promisee's desire to realise financial profit.

In the present work the contractual interest is conceived to be something more than a mere measure of the remedies that the promisee has in case of non-performance. The agreement is concluded chiefly to be performed and not in view of the eventual compensation available in case of breach. Besides this, contracts are not formed for making pecuniary profits only. On the contrary, the parties are not limited in respect to their choice of subject matter that they might wish to receive or of contractual aim that they may desire to achieve. This subsection will explore the promisee's non-pecuniary

²³⁶ cf. the present chapter, section C, subsection b, part iv.

²³⁷ cf. the present chapter, section C, subsection b, part i.

²³⁸ McKendrick, E., 1999. Breach of Contract and the Meaning of Loss. *Current Legal Problems*, 52(1), at 38.

²³⁹ Anson, W., 1879. *Principles of the English law of contract*. 1st ed. Oxford: Clarendon Press, at 195.

contractual interest as it may be derived from the agreement before its eventual breach. The analysis is divided into four parts. The first one demonstrates that the promisee's interest is not associated or measurable in relation to other elements of the contractual relationship like the counter-performance that he is obliged to provide to the other party or its monetary valuation. The second part continues this analysis by comparing the promisee's contractual interest to the market value of the stipulated subject matter of the agreement and to the enrichment that he would receive as a result of the performance. The third part explores how the promisee's reliance on the contractual performance may affect his interest. Lastly, the fourth part examines the inability of the contractual subject matter to define the contractual interest on its own. It is claimed that the contractual interest cannot be identified without reference to the contractual aim pursued by the promisee.

(i) The non-pecuniary contractual interest and the promisee's counter-performance

In the present analysis the contractual relationship has been explored from a more simplistic perspective, focussing only on the single obligation which the promisee is entitled to receive from the other party. However, contracts do not typically comprise a single obligation that the promisor is indebted to confer to the other party and a corresponding interest of this other party to achieve a certain aim with the receipt of the stipulated contractual benefit. In synallagmatic agreements there is a correlative duty of the promisee which represents the consideration for the promisor's obligation to render the covenanted subject matter. In unilateral contracts the promisee will have given or done something in exchange for the performance that he is due to receive from the promisor. It might be thought that the correlation between these counter-obligations may influence the contents of the promisee's interest. Thus, if the promisee has paid a particular amount of money for his train ticket to a specific destination, it could be perceived that his interest should be determined either with respect to the price that he paid or in relation to the monetary evaluation of the journey itself.

Such a conclusion would not be correct. It is true that the presence of consideration is an indispensable element of the formation of a contractual agreement. Furthermore, for a valid contract, other elements are needed.²⁴⁰ Once all of the required conditions are met and a binding agreement is concluded, the promisee's interest in receiving the stipulated subject matter and in achievement of his aim are not related to any other elements of the contractual contents. There are two separate components of the agreement that might be thought to represent the promisee's contractual interest. The first is the monetary value of the promisor's obligation. The second is the counter-performance or its monetary equivalent that the promisee is obligated to provide to the other party. The first one will be explored in the subsequent part of this subsection.²⁴¹ The question of whether the promisee's non-pecuniary contractual interest is dependent on the counter-performance that he is obliged to provide to the other party is subject to examination in the present part of this subsection.

The promisee's interest is not assessable or quantifiable with regard to the counter-performance that he has to provide to the promisor. Such a dependency has been explored and acknowledged as decisive, at least to some extent, both in

²⁴⁰ *cf. e.g., Chitty, op. cit., para 2-001 et. seq.*

²⁴¹ *cf. the present subsection, part ii.*

the legal literature²⁴² and in the case law.²⁴³ The main argument that is usually put forward in defence of such a position is based on the promisee's three-interest model.²⁴⁴ It is claimed that the last of these three interests is the promisee's restitutionary entitlement to receive back the counter-performance that he is obliged to provide to the other party. The view that such a contractual interest exists in English law could now be considered to be rejected,²⁴⁵ but some additional argumentation with regard to cases where the promisee pursues non-pecuniary interest should be added. This question has two separate dimensions. It could be thought that the promisee might have an interest in receiving back either the benefit that he has to provide to the other party or its financial equivalent. These two alternatives will be examined separately.

The promisee has no interest in receiving the pecuniary equivalent of the performance that he has to provide. It might be that his obligation cannot be subject to monetary evaluation at all. If the example from the previous section is reversed,²⁴⁶ the promisee might be obliged not to play a piano during certain hours of the day in return for the other party's obligation to clean the communal garden that serves all residents of the property. In this case the promisee has a non-pecuniary interest because as a result of the contractual performance he would be able to enjoy his cleaned garden which constitutes a non-pecuniary contractual aim. However, the counter-performance that he needs to provide is to keep silence during certain hours of the day so that his neighbour is able to get a quiet repose during this time. The promisee could not possibly have an interest in receiving the monetary equivalent of not playing his piano as it will not be able to fulfil the aim that he pursues. Even if this might be considered an exceptional example and in more typical cases valuation of the promisee's counter-performance would be feasible, it is still rather contentious that he would be interested in having his counter-performance back rather than receiving the promisor's obligation.

The main argument against the promisee having a restitutionary interest is that there is no monetary equivalence between the obligations of both parties. The law does not require any correspondence or correlation between the value of the contractual subject matter and the price that is to be paid for it. Although from an economic perspective, such equivalence might be typical, it is not a feature of the promisee's contractual interest. On the contrary – he concludes the contract only if he assesses subjectively that his interest in receiving the promised contractual benefit is worth more than the counter-performance that he undertakes to provide. The parties agree to conclude contracts as they perceive the performance that they are due to receive to be of a higher value than the corresponding performance which they are obliged to provide to the other party. In this case the monetary evaluation of the promisee's obligation might be lower than his subjective assessment of the promisor's performance. The promisee would therefore not be interested in receiving such a monetary substitution – from his outlook it would be of an inferior value. A similar conclusion would be reached if the promisee's subjective assessment of his counter-performance is compared to his entitlement to the stipulated contractual benefit. Any suggestion that the promisee might be interested in receiving back what he has given to the other party or its pecuniary equivalent would disregard the basic principles that motivate each party to conclude

²⁴² Peel, E., *op. cit.*, para 20-029.

²⁴³ *P&O Steam Navigation Co v Youell* [1997] 2 Lloyd's Rep. 136, at 141.

²⁴⁴ Fuller, L.L. and Perdue, W.R., *op. cit.*, at 63.

²⁴⁵ Campbell, D., *op. cit.*, at 298.

²⁴⁶ *cf.* the present chapter, section B, subsection b, part ii

the contract and, further to that, would undermine the principle of the binding force of the agreement, which protects each party's right to receive the promised subject matter.

(ii) The non-pecuniary contractual interest and the promisor's performance

The other interest that the promisee might be thought to have is in the receipt of the pecuniary equivalent of the covenanted subject matter. A few key objections against such an understanding may be raised. The first one has already been advanced in the previous part of the present work²⁴⁷ in relation to the pecuniary evaluation of the promisee's obligation – the parties may attach different values to the performance to its objective monetary valuation and thus they would prefer to obtain the subject matter which is due to them instead of its pecuniary value. The promisee would assess the other party's performance more than its market or other value. Secondly, even if this difference is taken into account and added to the monetary valuation of the promisor's performance, the promisee may not wish to receive a certain amount of money as a substitute for the contractual benefit. Such a payment will not lead to achievement of his contractual aims. Where the promisee has a non-pecuniary interest, the performance is not intended to enhance his financial position and his interest cannot be satisfied by a payment of a certain amount of money. In this case his aspirations in entering into the contract do not lie in the receipt of money, not only because in many cases this would not be able to provide a substitutive performance, but also because his contractual interest is not dependent on this possibility at all. He would wish to achieve his contractual aim with the performance rather than seeking a substitutive subject matter which could eventually lead to similar result in the limited cases where this would be possible.

It has been suggested that the promisee concludes the contract because he values the performance that he is due to receive more than his counter-performance. But this position could be expanded further to include the pecuniary value of the stipulated subject matter. It could also be concluded that the promisee assesses subjectively his interest in receiving the covenanted contractual benefit to be worth more than its objective market valuation. This is so as he concludes the contract with a view to receiving the stipulated subject matter. There is no reason to think that he is also interested in its substitutionary pecuniary value. Any contrary suggestion would disregard the common will of the parties and would undermine the principle of contractual freedom. The promisee forms the contract according to his particular preferences and desires so that he is able to satisfy his contractual aim. The performance would lead to fulfilment of the aim pursued by him. A payment of money would not have such an effect. At best it could only suffice for arrangement for an alternative performance which would not fulfil his contractual interest. If a family portrait is commissioned, but the promisee is forced to accept its market value instead of performance, he would not be able to have a pictorial record of the people that were due to be depicted and to enjoy the aesthetic qualities that the final product would have been expected to have. At best, the promisee might be able to find another artist who could complete the portrait, but he would never have the performance that he was initially due to receive from the original promisor.

Apart from that, in many cases the only possible way in which the promisee could have his non-pecuniary contractual interest satisfied would be through receipt of the stipulated subject matter. If the portrait from the previous example

²⁴⁷ *cf.* the present subsection, part *i*.

was planned to capture a family wedding,²⁴⁸ but it was not painted, there does not seem to be any alternative arrangement in which the promisee's contractual interest could be fulfilled. Even if it is assumed that there is a way in which the prospective market value of such a portrait could be assessed and the promisee is provided with an adequate amount of money, this auspicious celebration would have passed. No substitutive agreement could lead to receiving a painting of this event. In cases where the promisee has a non-pecuniary contractual interest, an eventual substitution of the covenanted subject matter with its market value could never lead to fulfilment of his contractual interest. This impossibility might be explained on the discrepancy between any objective financial valuation of the performance and its subjective assessment by the promisee. If it is supposed that in the above example the promisor was a renowned artist and the market valuation of the portrait reflects this, it would fail to incorporate the subjective value of the memories of this important family event that the promisee would have preserved should the portrait had been painted.

If he has a non-pecuniary interest, the performance would not lead to his enrichment indispensably, or any eventual enrichment would not reflect his non-pecuniary interest in receiving the performance. This outcome has been noticed in the legal literature²⁴⁹ where it is described that in certain types of cases no increase of the promisee's patrimonial wealth could be observed from balance sheet perspective. In the present work the explanation of this outcome seems axiomatic – if, as a result of performance, the promisee aims at achieving something other than enhancement of his financial position, then his interest lies in receiving some benefit of a non-pecuniary nature and he has a non-pecuniary contractual interest. The aim that the promisee would like to attain with performance will not lead to an increase in his patrimonial wealth. Any monetary quantification of the outcome of the performance cannot itself achieve the aim that he pursues through the performance as it aims to have a different effect than his enrichment. Due to the transformative effect of the performance that has been described in the previous section of this work,²⁵⁰ the promised contractual benefit, which in itself might have a certain pecuniary value and could be subject to a market valuation, leads to achievement of a contractual aim that does not have such features at all.

The promisee's non-pecuniary contractual interest cannot, therefore, be measured by a reference to the increase in his patrimonial wealth. In cases where he has a non-pecuniary interest, other values which cannot be subject to monetary valuation are pursued. This could be illustrated with a further example.²⁵¹ If the promisee is due to receive a lesson in contract law, his financial standing will not be enhanced immediately as a result of such a performance. Despite this lack of a patrimonial enrichment, he has an indisputable interest in receiving the promised contractual benefit. This interest is neither equal to the pecuniary value of the performance, nor to any eventual enrichment that he might gain from it. The promisee's interest in advancing his knowledge is not measurable in pecuniary or other economic quantifications at all. Therefore, its substitution with any of these two amounts will never reflect the true reasoning that stands behind his desire to receive the stipulated subject matter. The promisee concluded the contract not because he wanted to receive a certain amount of money, but because he would obtain something else of incorporeal value, which satisfies his pursuits of aesthetic, scientific, affectionate or any other non-pecuniary nature.

²⁴⁸ *cf. Diesen v Samson* 1971 SLT (Sh Ct) 49.

²⁴⁹ *cf. Webb, Charlie*, 2017. Performance Damages, *op. cit.* at 214.

²⁵⁰ *cf. the present chapter, section B, subsection b, part iii.*

²⁵¹ As per *Charlie Webb, op. cit.*, at 214.

(iii) Promisee's reliance on the contractual performance

Some authors²⁵² think that the promisee's contractual interest is in not being left worse off by virtue of his reliance on the contract. This idea has been popular initially abroad but was adopted later in England too.²⁵³ At first it might be thought that the concept of the promisee's reliance on the delivery of the agreed subject matter should mean his dependency on it and his trust that it would be provided as stipulated. In other words, it might be supposed that the reliance interest is just another way of expressing the promisee's interest in receiving the contractual performance and in its further usages according to its beneficial properties and qualities. Yet the intuitive meaning of the promisee's reliance on the contractual performance is not what most authors perceive when they are referring to it. With this term they express the monetary expenses or losses that the promisee might have incurred or suffered as a result of his belief that the contract would be performed as agreed. Two separate elements of this interest could be distinguished. The first one is the contractual counter-performance that the promisee provided to the other party as a form of a wasted expenditure. It is also called acquisition reliance.²⁵⁴ It has already been argued²⁵⁵ that the promisee has no interest in receiving back his counter-performance or its monetary equivalent.

The second element of the reliance interest is thought to include the promisee's entitlement to receive a reimbursement of all other expenses incurred in the belief that the contract would be performed as undertaken. Numerous instantiations of such expenses could exist. Thus, if the promisee commissions a family portrait by a famous artist, he might order special clothing that is to be worn by him and his family for the painting.²⁵⁶ He could also refrain from accepting alternative engagements for the times when his presence for the sketches of the portrait is required. This could lead to his missing a pleasurable event with friends or a promising business opportunity. Finally, the promisee might order a specially carved frame of expensive mahogany wood for the painting. The supporters of the existence of the reliance interest would claim that in all of these cases the promisee has an interest in receiving back the expenses which he has made in belief that the portrait would be painted as promised. This interest is thought to achieve an equally satisfying result as if the stipulated contractual benefit would have been provided as agreed.²⁵⁷

Such an understanding cannot be supported. It is certain that the promisee does not want to make his contract in vain. Still this does not mean that he would receive an equally satisfying as the promised performance if he was able to undo them or that he would be interested in ceding the contract. When this question is explored, one further qualification is needed – the promisee's restitutionary interest does not cover the cases when he might wish to cancel the contract unilaterally due to changes in the particular market or personal circumstances in which it might have been concluded and he would have lost his interest in the performance. Thus, in the above example the commissioner of the portrait might not be willing to receive it any more due to a deterioration of his relationship with the other people who would have

²⁵² Fuller, L.L. and Perdue, W.R., *op. cit.*, at 63.

²⁵³ Campbell, D., *op. cit.*, at 301.

²⁵⁴ Friedmann, D., *op. cit.*, at 644.

²⁵⁵ *cf.* the present chapter, section B, subsection a, part i.

²⁵⁶ *Diesen v Samson* 1971 SLT (Sh Ct) 49.

²⁵⁷ Fuller, L.L. and Perdue, W.R., *op. cit.*, at 67.

been depicted in it. Despite this, the binding force of the agreement remains until both parties agree otherwise. Hence there is only one feasible perspective from which the question of the promisee's reliance interest should be explored – whether he is able to achieve the same contractual result as the one which would have been agreed at the contractual formation if all of the arrangements that would have been made in belief that the agreement would be performed as stipulated were reversed.

There is no direct connection between the promisee's contractual interest understood as his entitlement to receive the agreed contractual benefit and the expenses that he might have incurred with regard to the contractual formation. In the above example the promisee might not have made any special preparations for the portrait at all. He might have merely agreed that the famous painter should come to his house on a Saturday evening when all members of his family are typically together and when no additional arrangement for preparation of the sketches would be needed. In such a case, if the promisee's interest is only in receiving back some amount that should compensate him for the expenses made in belief that the contract would be performed, then he would not be entitled to receive anything. Indeed, in many cases the promisee would not need to make any special arrangements with respect to the expected performance. Hence this does not affect his interests in receiving the promised contractual result. On the other hand, if such arrangements are made, they cannot always be reversed so easily. The missed pleasurable evening with friends that might have not been attended due to the promisee's engagement with the painter cannot be subject to market evaluation or monetary replacement as the proponents of the reliance interest suggest.

The theory of the reliance interest has three main deficiencies. Firstly, it implies that the promisee's contractual interest is in not being impoverished. As a result of this presumption, if he receives back everything that he might have paid in the belief that the contract would be performed, then his interest is satisfied. Secondly, it assumes that all arrangements which are made with respect to the anticipated contractual performance can be reversed successfully by payment of a certain amount of money. Lastly, it suggests that the reliance interest can substitute the promised contractual result. None of these assumptions is accurate. The understanding in the present work does not deny the promisee's right to rely on the contractual performance. It will be suggested that it constitutes a distinctive part of the promisee's contractual interest and exists along with his entitlement to receive the stipulated contractual result.²⁵⁸

(iv) Contractual subject matter without contractual aim

The promisee's entitlement to receive the stipulated subject matter of the agreement and the subsequent achievement of his contractual aim encompass his entire contractual interest. Beyond them there does not appear to be any additional or alternative interest that might have any similar effect as the exact performance of the contract and the subsequent attainment of the aim that the promisee would pursue with this. The last general point that the present part of this subsection will explore is the necessity of including the contractual aim within the structure of the promisee's interest. In previous parts²⁵⁹ it has been suggested that the distinction between pecuniary and non-pecuniary losses can be established only by reference to the nature of the contractual interest, which in turn depends on the contractual aim that

²⁵⁸ *cf.* the present chapter, section B, subsection c, part iv.

²⁵⁹ *cf.* the present chapter, section A, subsection c, part iv.

the promisee pursues with the agreed performance. The correlation between the contractual subject matter and the aim has also been examined in detail.²⁶⁰ The last aspect of their complex relationship that will be studied in this part is associated with the impossibility of excluding the aim from the promisee's contractual interest. No authors take account of the aim as a constitutive element of the contractual interest. The present analysis will refute these narrow perceptions and will confirm that the only interest that the promisee has when concluding the contract is to achieve his pursued aim by the delivery of the agreed subject matter.

It has been submitted previously²⁶¹ that the promisee is not interested in receiving the covenanted contractual benefit *per se*. He concludes the agreement only because he desires to utilise some or all of the beneficial qualities that the performance would provide. Such a result is possible in so far as the contractual aim is achieved. If it is accepted that the promisor's obligation to deliver the subject matter of the agreement exhausts the other party's interest entirely, then it would mean that these two terms – contractual subject matter and contractual interest, are identical. Such a conclusion raises a number of uncertainties. It is not clear why a specific term with established meaning – contractual subject matter – has to be substituted with another one – contractual interest. Furthermore, it is quite dubious if such a substitution has to be made only in certain circumstances – for example when the amount of damages that are due to the promisee is quantified. If those two terms were expressing identical concepts, then they would have been interchangeable in all other cases too.

The existence of the concept of contractual interest, which is sometimes described by other terms,²⁶² all of which aim to incorporate the advantage that the promisee would gain from the performance, suggests that the interest is not identical with the promised contractual benefit. It might be thought that the lack of such an identity has been felt by the other authors at least unwittingly, as none of them seems to think that there is no difference between these two concepts. Yet none of them has tried to explain the relationship between the contractual interest and the subject matter of an agreement. It could be supposed that the contractual interest is a broader term. Firstly, the opposite suggestion would not correspond to the perception of subject matter. The subject matter has been defined as the contractual result that the promisor is obligated to provide to the promisee. This result does not have any constituent elements into which it could be divided. Secondly, the promisee could not have his interest satisfied with something less than the stipulated contractual result. Accordingly, the contractual interest cannot comprise of something less than the contractual subject matter. Therefore, it can be concluded that the concept of contractual interest encompasses neither something less nor something identical to the promised performance.

The only plausible conclusion, therefore, is that the contractual interest comprises an additional element along with the subject matter of the agreement. The identification of this element may be found in the functions that the concept of contractual interest serves. This interest expresses the advantage or the benefit that the promisee would gain from the contractual performance. In the present work it has been established additionally²⁶³ that it is a criterion on which

²⁶⁰ *cf.* the present chapter, section B, subsection b, parts i-iv.

²⁶¹ *cf.* the present chapter, section B, subsection b, parts i.

²⁶² For the terms that are used by other authors to describe the contractual interest, *cf.* chapter 3, section A, subsection a, part i of the present work and the literature referenced there.

²⁶³ *cf.* the present chapter, section A, subsection c, parts i-iv.

pecuniary and non-pecuniary losses could be distinguished. It is also perceived as a measure of the promisee's entitlement to receive damages for compensation for breach.²⁶⁴ If the non-pecuniary contractual interest captures the promisee's advantage or benefit that is gained as a result of the performance, it must include nothing but the aim that the promisee pursues with the agreement. The aim is the element that establishes the connection between the contractual result and the promisee's particular interest in the agreement. Without achieving this aim, the promisee has no interest in the performance at all. He concludes the agreement only in view of the probable attainment of the aim and, should that prove to be impossible, he would gain no benefit or advantage from the performance at all. The inclusion of the contractual aim in the structure of the contractual interest reflects naturally the forces that stand behind the promisee's desire to form the contractual relationship.²⁶⁵

The main advantage of this new understanding of the scope of contractual interest, for the purposes of the present work, is that it provides a more principled and comprehensive approach to the concept of non-pecuniary losses. The existence of a non-pecuniary contractual interest in a particular agreement determines the presence of non-pecuniary losses. But the non-pecuniary nature of the contractual interest can only be defined with regard to the aim of the agreement. The stipulated subject matter alone is unable to identify the cases where the promisee has a non-pecuniary contractual interest. The proposed new understanding of the contents of the contractual interest does not affect its ability to serve its other purposes too. It can still be an adequate measure of the losses that are suffered in cases of breach and the damages that are due for their compensation.²⁶⁶ A more detailed analysis of the components that comprise the contractual interest as they may be derived from its function in determining the scope and the extent of the losses inflicted as a result of the non-performance would demonstrate that the contractual aim is its unavoidable constitutive element.

Conclusion to subsection a

Nonetheless the importance of the contractual subject matter should not be doubted. It constitutes the obligation that the promisee is due to receive and it is the foundation on which his contractual aims might be achieved. It could not be otherwise, as the core of the contractual relationship is the covenanted subject matter. The promisee chose it for its ability to fulfil his contractual aim. The subject matter would have been selected for its specific qualities and characteristics that enable the achievement of the contractual aim pursued by the promisee. The contractual subject matter and the aim in their causal correlation could be perceived as a comprehensive and complete representation of the promisee's interest in the contractual relationship.

Therefore, the non-pecuniary interest might be defined as the non-pecuniary outcome that the promisee would like to gain from the performance. This interest has two elements. The first is the delivery of the stipulated contractual benefit due from the promisor. The second element is the achievement of the immediate aim that the promisee would attain as

²⁶⁴ McKendrick, E and K. Worthington, *op. cit.*, at 303.

²⁶⁵ Perhaps this is why some authors think that if the contractual aim occurs to be unachievable, the contract is frustrated, *cf.* Treitel, G., *op. cit.*, para 7-001 *et. seq.*

²⁶⁶ *cf.* Chitty, *op. cit.*, para 26-022.

a result of the performance. In order to be considered as having a non-pecuniary nature, the aim could be anything else apart from or along with a mere increase in the promisee's patrimonial wealth. He concluded the contract with a view to receiving such a non-pecuniary outcome and performance of substitutive or alternative subject matter might not lead to this effect. In particular, the promisee would not be satisfied in the same way if instead of the covenanted subject matter he receives back his counter-performance or its market equivalent. Similarly, a monetary payment in lieu of the promisor's obligation would not lead to achievement of the aim pursued by the promisee with the contract. Thus, the promisee's interest is not dependent on any other correlated obligations that he is due to provide to the other party.

(b) Non-pecuniary contractual interest and contractual aim

Introduction to subsection b

The promisee's non-pecuniary contractual interest is neither related to any other element of the agreement nor can it be substituted by a payment of a certain amount of money. It can only be fulfilled by an exact performance as undertaken at the time when the contract is concluded. The central element of the contractual interest is the stipulated subject matter which defines the boundaries of the promisor's obligations. However, the nature of the contractual interest cannot be perceived in full if the aim that the promisee wants to achieve with the delivery of the subject matter of the agreement is not taken into account. The contractual aim represents the particular value or usage that the performance would provide to the promisee. The notion of the contractual aim and its correlation with the covenanted subject matter has been explored in detail in the preceding parts of this chapter.²⁶⁷ The purpose of the present subsection is to examine how the aim pursued by the promisee can determine the contents of his non-pecuniary contractual interest. In particular, it demonstrates that, without the notion of the contractual aim, a number of important questions related to the nature and the scope of the non-pecuniary contractual interest would remain unanswered.

The present subsection comprises four parts. The first one explores the scope of the non-pecuniary contractual interest. It analyses some of the most important cases which may provide guidance about the interaction between the subject matter and the aim that the promisee might pursue with its delivery. This part demonstrates that there are many cases in which the promisee has a genuine interest not in enhancing his patrimonial wealth, but in achieving other aims with the contract. The succeeding three parts examine the relationship between the stipulated subject matter and the aim with respect to the non-pecuniary contractual interest. The second part explores cases where the exact performance might not lead to achievement of the contractual aim. The third part analyses the possibilities of attaining the contractual aim despite an eventual lack of exact performance. In particular, it examines how the promisee's interest could be affected in these cases despite his achievement of the contractual aim. The last part continues the study of the non-pecuniary contractual interest with regard to the correlation between the subject matter and the aim. It confirms that the only feasible way in which the promisee's interest can be fulfilled is by an exact performance and a subsequent achievement of the aim that he pursues.

²⁶⁷ *cf.* the present chapter, section B, subsection b, part iv.

(i) Scope of non-pecuniary contractual interest

English contract law does not establish any restrictions with respect to the aims that the promisee may wish to achieve with an agreement. However, contracts have traditionally been seen exclusively as commercial tools.²⁶⁸ On this reckoning they are designed to facilitate trade and hence the promisee's interest has been perceived as wholly financial. This position has been confirmed both in the legal literature²⁶⁹ and in the leading authorities.²⁷⁰ In these cases the law protects the promisee's financial position and it aims to ensure that the performance rendered is of no lesser value than the one he was promised.²⁷¹ All the same, it has already been explained in detail why the promisee's interest is not limited to or defined by his counter-performance or to its financial equivalent.²⁷² Besides this, there are further arguments which refute the proposition that contracts are merely entrepreneurial instruments whose purpose is to enhance their parties' wealth. These arguments will be explored in more detail in the present part of this subsection.

The position that is inferable from some traditional understandings endorsed in classical contract law theories²⁷³ which explore the delivery of the covenanted subject matter in a purely commercial context²⁷⁴ is that the promisee's interest will be equally fulfilled in cases where he does not receive an exact performance as promised, if the subject matter which is actually rendered to him is of identical financial value. This understanding is rooted in the perception that people enter contracts for commercial reasons only and that their interest is to have their patrimonial wealth increased as a result of the performance. Such views deny the existence of any non-pecuniary contractual interest. One of the reasons for this limited perception of the scope of the promisee's interest could be the lack of a concept of non-pecuniary contractual aim. It has been suggested²⁷⁵ that in all contracts the promised benefit is either of tangible nature or could be subject to financial evaluation. It may then be wrongly assumed that the promisee's contractual interest could not be affected adversely if he receives something else of equal value. Interestingly, this was suggested²⁷⁶ even for non-commercial cases where the promisee wanted to receive a violin lesson from a world-renowned musician or where he was promised a pleasant holiday. In all of these examples it was thought that should the promisee have received different services of equal value, then his contractual interest would have not been affected. Even if it is accepted that monetary compensation can provide something which is of equal value to performance, the promisee's rights in these cases are not limited to acquiring something of equal value.

There are various arguments against this conclusion and some of them have already been set out.²⁷⁷ It should be added further that, if the aim which the promisee pursues with the delivery of the contractual subject matter is examined closely, it would seem even more compelling that the contractual obligation might serve much wider interests than it is

²⁶⁸ *cf.* McGregor, *op. cit.*, para 5-015.

²⁶⁹ *cf.* *supra* note 266.

²⁷⁰ *White Arrow Express Ltd v. Lamey's Distribution Ltd* (1996) [1995] C.L.C. 1251.

²⁷¹ *Op. cit.*, at 1254.

²⁷² *cf.* the present section C, subsection a, parts i-iv.

²⁷³ For a rejection of these ideas, *cf.* McKendrick, E., 1999. Breach of Contract and the Meaning of Loss, *op. cit.*, at 41 *et. seq.*

²⁷⁴ *cf.* McGregor, *op. cit.*, para 25-001 *et. seq.*

²⁷⁵ *cf.* the present chapter, section C, subsection a, part i.

²⁷⁶ *White Arrow Express Ltd v. Lamey's Distribution Ltd*, *op. cit.*, at 1254.

²⁷⁷ *cf.* the present section C, subsection a, parts i-iv.

traditionally thought. The subject matter that the promisor is obligated to provide cannot in itself be a criterion on which the other party's contractual interest could be assessed. As has been explored previously, identical subject matters could facilitate very divergent purposes. An example from the aforementioned case²⁷⁸ that rejects the existence of non-pecuniary contractual interest in general could illustrate the importance that the contractual aim might have with regard to the identification of such an interest. It is said that if the promisee contracts for violin lessons from a world-famous performer whose rate is five hundred pounds per hour, but instead he receives a lesson from another person who charges twenty-five pounds per hour, then his pecuniary contractual interest would be affected with the difference between these two rates.

But such an understanding does not take into consideration the aim of the agreement. Thus, even if the justification of the view expressed in the case could be sought in the promisee's pecuniary interest not to pay a disproportionate price for the services that he would receive, it fails to capture his eventual non-pecuniary contractual interest, which might have various dimensions depending on the possible aims that he pursues with the agreement. In that regard there might be different possibilities. If the violin lessons are needed for the promisee's personal satisfaction which he would receive if his playing skills are improved, then it would be rather implausible to accept that his interests are of purely material nature. On the other hand, the promisee might be planning to record an album with his violin performances for commercial purposes. In this case his contractual aim would be pecuniary – learning to play violin so that he is able to achieve financial profits. It should also be noted that in practice these two and other feasible aims might be pursued simultaneously. If the non-pecuniary aim from this instance is not taken into consideration, then the wider scope of the promisee's contractual interest would not be identified.

There may be other reasons²⁷⁹ for which English contract law might prefer not to acknowledge the existence of this broader aspect of the promisee's contractual interest. Hence the functions which contemporary contract law serves are much wider than they were a few decades ago. Many people conclude contracts to improve their quality of life, or to receive some pleasurable experience of an aesthetic, artistic or scientific nature. The aim they pursue will provide a much wider scope of their contractual interest. The number of contracts where the stipulated services do not add anything to the promisee's patrimonial wealth is increasing enormously. In many cases such contracts are entered purely in view of receiving a non-financial benefit. The failure of many past cases to identify the scope and the contents of the promisee's contractual interest might be explained by their lack of recognition of the concept of contractual aim. The law has perceived contracts as concluded in commercial contexts.²⁸⁰ This fails to acknowledge the existence of non-pecuniary aims and thus provides too narrow an understanding of the scope and contents of the contractual interest.

(ii) Performance which does not lead to achievement of the contractual aim

²⁷⁸ *White Arrow Express Ltd v. Lamey's Distribution Ltd*, *op. cit.*, at 1254.

²⁷⁹ Some of them could be of policy nature, *cf. eg.* Enonchong, N., *op. cit.*, at 618.

²⁸⁰ Similar conclusion in McKendrick, E., 1999. *Breach of Contract and the Meaning of Loss*, *op. cit.*, at 41.

Before continuing with the examination of the manner in which the contractual interest is defined both by the subject matter of the agreement and the aim pursued by the promisee,²⁸¹ it is interesting to explore how this interest is affected if only one of its two constitutive elements are attained. It has been noted²⁸² that a very close correlation between the contractual subject matter and the aim exists. Thus, if the promisee wants to be able to read a certain book it would suffice if he buys it from a bookstore or borrows it from a library. The performance would provide him with an immediate opportunity to achieve his contractual aim. However, the factual circumstances in which such contracts would have been concluded might change at a later moment so that either the contractual aim becomes unattainable despite the performance or the same contractual aim is achieved via other means. Thus, the promisee's health might deteriorate temporarily so that it prevents him from reading the book. In such a case even if the agreement is performed, he will not be able to fulfil his contractual aim. On the other hand, instead of the paper one, the bookseller or the library may provide electronic copy of the book. This may not have been agreed initially, but such an inexact performance might not prevent the promisee from achieving his contractual aim – being able to read the book. This and the subsequent parts of the present subsection will explore how cases of defective or partial performance might affect the promisee's non-pecuniary interest.

The fulfilment of the pursued aim is an indispensable and consequential result of the performance. This is so as the parties would have designed their contractual relationship to work in this way. The promisee chose such a subject matter as it would lead to achievement of his aim. In *Hobbs* the promisee had decided to use a particular rail service that was supposed to take him and his family to a desired station from where they would have been able to walk to their house. In *Jarvis* the promisee had selected a vacation that best suited his vision for an agreeable Christmas holiday in the Alps. If other cases where the promisee has a non-pecuniary contractual interest are analysed, it will be seen that he has chosen the stipulated performance in view of its qualities, properties or particular features, such as may lead to attainment of his aim directly. But the cases which are explored in this part of the present chapter are those where regardless of this choice, the contractual aim would not be achieved as a result of performance. In other words, the purpose of the present analysis is to address the occasions where despite an exact contractual performance, the promisee might have no interest in it. Furthermore, this situation should not be mistaken with the cases where the promisee might have no further interest in the contractual performance in general due to changes in his personal preferences or in the market circumstances which might have provided a more profitable or cheaper substitutive performance available from third parties or obtainable otherwise.²⁸³

If the circumstances in which the promisee might be unable to achieve his contractual aim are explored, it will be seen that the causal relationship between the promised contractual result and the promisee's aim has either never existed or ceased to exist after the contract was formed. Although these instances have already been mentioned in relation to their legal consequences,²⁸⁴ they should be examined further with respect to their ability to determine the promisee's contractual interest. In *Hobbs* the promisee might have not been able to walk to his house from the chosen station due

²⁸¹ cf. the present subsection, part *iv*.

²⁸² cf. the present chapter, section *B*, subsection *b*, part *i*.

²⁸³ cf. similar distinction of cases in the present section, subsection *a*, part *iii*.

²⁸⁴ cf. the present chapter, section *B*, subsection *b*, part *i*.

to his error in selecting the appropriate service. Thus, instead of taking a train to Hampton Court, he and his family might have mistakenly purchased a ticket for a service to Claygate, which is on another branch of the South Western Main Line. In this case, even if the promisor has conveyed them to the stipulated destination, they would have been unable to attain their contractual aim. Alternatively, the promisee might have boarded the correct service to Hampton Court station which is situated just south of the river Thames. However, as his house was on the northern bank of the river, and Hampton Court Bridge, which could be used for crossing, was closed on the night he travelled and no other means of crossing the river were available, then he would be unable to achieve his contractual aim despite the exact performance.

In both instances the promisee would have no contractual interest in the provision of the stipulated subject matter. In the first example his interest never existed because the stipulated subject matter was never able to lead to achievement of his aim. In a similar case, which has already been examined,²⁸⁵ it was held that the contract was void for mistake. In the second instance the promisee's non-pecuniary interest ceased to exist at the moment when the crossing of the river became impossible. In identical cases the courts have decided that this leads to frustration of purpose.²⁸⁶ The question of the legal effects of such agreements exceed the scope of the present work and therefore it will not be examined further. Hence it is important to emphasise the leading role of the contractual aim in these cases. Even if the covenanted subject matter is deliverable as agreed between the parties, the unattainability of the contractual aim leads to initial non-existence or consequential disappearance of the promisee's contractual interest. This conclusion demonstrates the importance that the contractual aim has as a constitutive element of the contractual interest. There will be cases in which the promisee's aims cannot be achieved by performance and, where this is so, there will be no losses suffered in the event of breach.

(iii) Non-performance which leads to achievement of the contractual aim

A further question which follows from the conclusion that the promisee has no interest in the performance of the contract should he be unable to attain his aim, is whether he can insist that he achieves his contractual aims only via the stipulated performance. In other words, the query that would be explored in this part is whether the promisee's interest includes the achievement of his aim only or it also encompasses the means by which this should happen. As will be further demonstrated, this question has many practical implications as the parties do not necessarily agree on the promisee's aims. The promisor usually undertakes to provide a certain contractual subject matter that would lead to attainment of the aims pursued by the other party. *Ruxley* can illustrate this point well. The promisee's aim was to have a swimming pool in which he would be able to dive safely. It was established that despite the partial non-performance this aim had been achieved. The shallower pool did not pose any safety threat to anyone who might be wishing to dive in it, despite his or her bodily structure or weight. In that case the question would be if the promisee's non-pecuniary interest in the construction of the pool was satisfied.

Another example could elucidate this query further. In *Hobbs* the promisee's interest was to be transported to a certain railway station from where he would have been able to walk to his house. It could be imagined that his house had been

²⁸⁵ cf. the present chapter, section B, subsection c, part iv.

²⁸⁶ cf. the present chapter, section B, subsection a, part ii.

at an equal walking distance from Hampton Court and Esher railway station. Then it would appear that his contractual aim would have been equally attained despite the breach as he would have been able to walk to his house from either station. Furthermore, it could be supposed that both railway journeys had been of identical duration so that the promisee would not need to spend more time on the train to Esher. Two other assumptions could also be made. In addition to the promisee's main contractual aim, there may have been some additional aims which might be factored into his non-pecuniary contractual interest. He might have chosen the line to Hampton Court as it provided more spectacular views or the route from Hampton Court Station to his house might have been more pleasant, less dangerous or in any other way superior to the one from Esher. However, it could also be supposed that these two additional contractual aims – to be able to enjoy the picturesque Surrey scenery from his train carriage and then to be able to walk to his home via a safe and agreeable route, would have been equally attainable by the promisee despite the breach. The question would then be whether such a non-performance might affect his non-pecuniary contractual interest.

There might be two different views of the contents of the contractual aim in *Ruxley*. The first one is that the promisee wanted to have a swimming pool in which it was in fact safe to dive. The evidence that appears to have been presented before the court supports this position. The alternative understanding might be that the promisee's aim was to be able to feel safe when diving. There is no information in the reports that any of the parties relied on such a statement at all. Therefore, it ought to be assumed that the contractual aim was the promisee's ability to dive safely in the swimming pool and that his subjective perception of his physical safety was not an element of his contractual aim. However, the case does not provide any confirmation that the contractual aim was considered to be fulfilled. On the contrary, from the examples provided by Lord Jauncey of Tullichettle²⁸⁷ it could be concluded that the non-performance affected the promisee's possible personal preferences. Lord Mustill continues this line of argument, stating that the law should take into consideration cases 'where the value of the promise to the promisee exceeds the financial enhancement of [the promisee's] position which full performance will secure'.²⁸⁸ Despite this apparent unfulfillment of some personal preferences, there does not seem to be any clear identification or understanding of their origin or nature. On the contrary – it was clear that the promisee's personal preferences to be able to dive safely were actually attained.

The reason for this discrepancy is that the feature of the agreed subject matter, which in this case was the depth of the pool, was not seen by the court or the parties as related to any contractual aim. It is evident from the facts of the case that the promisee did not establish any connection between the desired depth of the pool and a corresponding contractual aim which would have been achieved with an exact contractual performance. Thus, if the promisee had stated that in the future he might dive from a board, which requires a deeper pool, then his contractual aim would have not been attained as a result of the defective non-performance. Similarly to the example provided with regard to the facts in *Hobbs*, the inaccurate non-performance does not affect any conceivable aims that the promisee might pursue. Then the grounds for an eventual insistence on exact performance seem to be without sufficient merits. Indeed, if the promisee receives everything that he could have expected from the contract, there would be a breach, as the aim would have been achieved despite the breach, but no losses would be caused.

²⁸⁷ *Op. cit.*, at 358 *et. seq.*

²⁸⁸ *Op. cit.*, at 359-360.

Such would be the case if the promisee's house in *Hobbs* was of equal distance from both Esher and Hampton Court railway stations and if all other conceivable contractual aims pursued by the promisee at the contract formation had been achieved with the inexact performance. The conclusion that the promisee has no interest to object to such a contractual breach would follow naturally from the understanding about the essence and the effects of the contractual aim suggested earlier.²⁸⁹ The promisee would want to obtain the stipulated subject matter only for its beneficial properties and qualities. The railway journey alone was not, it might be imagined, of any intrinsic value to the promisee or his family. He merely wanted to be transported to a certain destination from where he would have been able to walk to his house. If the result that would follow from the inexact performance could lead to this outcome, then it appears that his contractual interest would have been satisfied completely. There are no reasons for the promisee's insistence on exact performance if this would not provide any additional benefits than those attained with the defective or incomplete performance. Despite this, it should be noted that there is usually a very close correlation between all particular features of the contractual subject matter and the aims pursued by the promisee. This would mean that the cases where the defective or incomplete performance could lead to achievement of all aims pursued by the promisee would not be too many. In *Hobbs* the choice of the station and the particular timing of the railway service were not arbitrary for only they could lead to achievement of the promisee's aim to be at his house at a certain time of the evening.

(iv) Fulfilment of the contractual interest

The content of the agreement, as stipulated between the parties, is designed for achievement of the promisee's contractual aims. The close correlation between the features of the contractual subject matter and the aims that are achieved with it has already been examined.²⁹⁰ It has been concluded that the contractual interest consists of the contractual result and the aim achievable upon its rendering. The above examples of cases where the contractual aims are attainable despite the lack of an exact performance are exceptional. They appear only in cases where there are specific features of the contractual subject matter which do not lead to fulfilment of any contractual aim at all. The judges in *Ruxley* faced this particularly rare situation. They had to decide a case where the promisee's non-pecuniary contractual interest had been satisfied despite the defective performance. This is so as the non-pecuniary aim claimed to be pursued by the promisee and not contested by the other party was achieved regardless of the substandard or incomplete performance. The swimming pool was safe for diving despite its being shallower than agreed. Further to that, the promisee was unable to persuade the judges of any other reasons for his insisting on exact performance. It was not clear what else he could attain if the swimming pool was built with the promised depth.

Most contracting parties will be able to specify a certain contractual aim that they would want to attain with a particular feature or quality of the subject matter which they are due to receive. The promisee in *Ruxley* failed to do so and this led to the unwillingness of the court to recognise his non-pecuniary interest in receiving an exact performance in the form in which it is defined in the present work. Indeed, the promisee did not have such an interest at all as one of its constitutive elements – a non-pecuniary aim, was missing. In this case the promisee did not have a non-pecuniary contractual aim that corresponded to the specified depth of the pool. However, this would not be a common situation. The promisee will

²⁸⁹ cf. the present chapter, section B, subsection b, part ii-iv.

²⁹⁰ cf. the present chapter, section B, subsection b, part i.

be motivated to choose the most efficient contractual subject matter with respect to its price, timeliness, and appropriateness for attainment of the aims he wishes to pursue with its delivery. He will be motivated to do so by his natural desire to provide a counter-performance which would be as little as possible. A specific subject matter provides a particularly effective means of achieving his contractual aim. Thus, in *Ruxley* the promisee would have paid a lower contractual price if he commissioned a shallower pool. In other words, the promisee is motivated to choose the easiest, cheapest and most efficient contractual subject matter that would lead to an fulfilment of his contractual aim. The promisor in turn is also motivated to choose the stipulated way of performance as it would be least resourceful. Even if there are other alternative routes that would lead to achievement of the promisee's aims, the promisor will not prefer them as they would be more onerous to him. Thus, he would not be motivated in building a swimming pool deeper than agreed as this would cost him more.

Therefore, in all circumstances reasonable parties seek to choose such a contractual subject matter that leads to achievement of the promisee's aims through the most efficient contractual subject matter. The promisor would not be interested in providing a more burdensome alternative performance despite its potential ability to lead to attainment of these aims. At this point it should also be noted that the promisee can always demand exact performance without providing a particular reason to the other party for this, including without any necessity of stating what his contractual aims might be. In most cases such insistence would have its merits in the promisee's desire to satisfy his contractual interest and, if this is so, the courts would be willing to uphold such a contractual interest without any reservation. This conclusion can be derived not only from *Ruxley*, where it is difficult to identify any particular reason for the claimant valuing the extra depth. *Jarvis* provides a positive example. There were many very specific features of the contractual subject matter, each of which was found to correspond to the contractual aims pursued by the promisee. Even such trivial details as musical performances during dinner, alimentary requirements or minor details of the arrangements for rest were found to be relevant with regard to the promisee's aim of receiving a pleasurable winter holiday.

The promisee is entitled to receive exact performance as he should be able to choose the route via which his contractual aims will be attained. This is the reason why the contractual subject matter should be considered to be a constitutive element of his contractual interest. The promisee cannot be forced to accept an inexact performance if he does not wish to do so. His interest is in the achievement of his contractual aims precisely through the subject matter that he would have chosen. All of the specific characteristics of the contractual subject matter might be related to achievement of a particular aim, which does not need to be revealed to the other party. In contrast to a claim pursued before a court, where the specific promisee's contractual interest needs to be established, at this stage of the obligation, which is the subject of examination in the present chapter, he acquires an entitlement to exact performance without any requirement that it correlate with any possible aims which would be achieved with it. The binding force of the agreement is not conditional on any qualification with respect to an establishment of possible aim that the promisee could pursue with the particular agreement.

There are various reasons why the promisee would be interested not only in achievement of his contractual aims, but also in the manner in which it will result from the delivery of the stipulated subject matter. Thus, he might have chosen the covenanted bargained-for benefit as it could be cheaper than other feasible alternatives. It might also be more

efficient, resilient or have longer lasting effects. In *Jarvis* the promisee's aim to have a satisfying winter holiday might not have been achieved if other alternative entertainments were provided. It is entirely dependent on his individual choice as to how his contractual aims would be achieved. If he chooses to have a candle-lit dinner, the promisor cannot unilaterally provide him with a substitutive supper in a different environment, claiming that it would be equally satisfying. The promisee has selected a certain manner in which his non-pecuniary contractual interest would be fulfilled. Its substitution with a different performance can never lead to achievement of his aim. A winter holiday in the Alps is not necessarily equal to a summer holiday in Nice. If the promisee has chosen what suits his specific non-pecuniary aims better, the promisor cannot change this by an alternative performance of equal value or allegedly equal non-pecuniary outcomes.

This conclusion is particularly true with respect to the non-pecuniary aims that are pursued. Even if the example from the previous part is explored, where it was assumed that the promisee's house in *Hobbs* might have been at an equal distance between Esher and Hampton Court railway stations, there might be further non-pecuniary aims pursued by the promisee and which might not have been achievable in cases of inexact performance. Thus, although Surrey offers many splendid countryside views, the promisee might think that the sights that are visible from the branch line to Hampton Court are much more pleasing than the ones which are presented to the passengers who are travelling to Esher. He would then be entitled to receive the performance as it was agreed. The other party cannot change the way in which the promisee's contractual interest would be fulfilled. An alternative performance leading to allegedly identical contractual aims cannot be foisted upon him.

Conclusion to subsection b

These observations confirm the importance of both elements of the contractual interest – the stipulated subject matter and the aims that would be achieved with its delivery. Their very close causal correlation means that the promisee's contractual interest has a much wider scope than is traditionally perceived. It has often been assumed that contracts are concluded for commercial purpose only. Nowadays this position has changed. Many contracts aim to improve the quality of life, to provide pleasure or to enhance the aesthetic feelings of the promisee, rather than to increase his patrimonial wealth. In these cases, the promisee's non-pecuniary contractual interest is not identical or substitutable with his counter-performance or its monetary equivalent. Nor is it measurable by any feasible market evaluation of the contractual subject matter. The promisee is always interested in receiving the covenanted subject matter and in the achievements of the aim with the delivery of that subject matter.

If any of these two elements of the contractual interest is missing, the promisee would have no advantage in the performance of the agreement. If the delivery of the stipulated subject matter does not lead to achievement of his aims, it would be entirely useless to him. This would happen when the specific causal relationship between the contractual aim and the subject matter ceases to exist. In such cases the courts are not likely to uphold the contract which demonstrates further the importance of both elements and their close correlation for the existence of the contractual interest. Although there could be some rare cases when the contractual interest might be attained with inexact performance, the general principle is that the promisee's aims can only be achieved if the bargained-for benefit is delivered as agreed. All

peculiarities and features of the covenanted subject matter would have been chosen by him in view of their ability to lead to achievement of his contractual aim and even an insignificant case of a breach could prevent fulfilment of his aims. For this reason, the binding force of the agreement is not conditional on any considerations of policy or practical nature²⁹¹ – the promisor is always obliged to provide the stipulated subject matter and correspondingly, the promisee is entitled to have his contractual interest fulfilled as agreed.

(c) Non-pecuniary contractual interest beyond the contractual subject matter and aim

Introduction to subsection c

Thus far the promisee's contractual interest has been explored as comprising the stipulated contractual result and the immediate aim that would be attained when this result is provided. In addition to this, in many cases the promisee would pursue further objectives with the contract that would follow from the achievement of his contractual aims. In *Hobbs* the promisee had travelled on a train to a certain destination from where he and his family would have been able to walk to their house. Besides this, his further purposes might have been to be able to take a safer route to their house or not to have any unforeseen troubles during their walk, for instance, not catching a cold on their way, which in fact happened to the promisee's wife.²⁹² In an agreement for a railway journey, such an additional non-pecuniary contractual aim could be attending an opera performance or a scientific conference at the specified destination, with the promisee then suffering non-pecuniary losses if he is unable to attend. The subsequent purposes that might be pursued with an agreement can be distinguished from the contractual aims as they have been analysed so far with regard to their causal relationship with the subject matter. All such further contractual purposes²⁹³ follow from the achievement of the primary contractual aims. They are not a direct consequence of the delivery of the stipulated subject matter of the agreement.

The present subsection explores this consequential non-pecuniary contractual interest. It will comprise four separate parts. The first examines the distinction between the promisee's primary contractual aims and any further objectives that he may pursue with the agreement. It has already been concluded²⁹⁴ that the distinction between pecuniary and non-pecuniary losses is to be drawn with regard to the nature of the promisee's contractual interest. In the second part of this subsection it is seen if a similar conclusion can be reached with respect to the ability of the subsequent aims to define the nature of the consequential losses suffered in the event of breach. The third part of this subsection explores the scope and the nature of the subsequent non-pecuniary contractual aims that the promisee might pursue. It examines the manner in which they can be identified and their correlation with other elements of the agreement. Finally, the last part studies the consequential non-pecuniary contractual interest. It explores its relationship with other elements of the agreement such as the counter-performance due by the promisee or its monetary equivalent. It also examines whether

²⁹¹ However, this is not true about the assessment of damages in case of breach, *cf. e.g.*, chapter 3, section B.

²⁹² *cf. Hobbs, op. cit.*, at. 112

²⁹³ For clarity these further purposes that are pursued by the promisee would be referred to as 'subsequent aims', their ability to determine the type of losses suffered as a result of their non-fulfilment is explored further in the subsequent chapter, section B, subsection c, part iv.

²⁹⁴ *cf. the present chapter, section A, subsection c, part iv.*

this contractual interest can be fulfilled in any manner other than through attainment of both the primary and the subsequent contractual aims that lead to it.

(i) Normal and consequential losses

The analysis in the present chapter explores the content of the contractual relationship before its eventual breach. It has been concluded²⁹⁵ that in cases where the promisee aims to achieve a non-pecuniary aim, non-performance may cause harms of non-pecuniary nature to him. It has also been established that in all other circumstances only losses of financial essence can occur. This position needs one further qualification with respect to the nature of the harms that are examined. The analysis that has been adopted thus far takes into account the losses which are caused directly from the breach, or if the terminology adopted in the present work is used, the losses that are inflicted by the promisee's inability to achieve his primary contractual aims. In addition to these harms, which are usually perceived as normal losses,²⁹⁶ English legal literature identifies another type of losses too. These derive from the normal losses, but their causal relationship with the contractual non-performance is indirect. While the normal losses are an immediate outcome of the non-delivery of the promised contractual subject matter, these further, consequential losses are more distant consequences of the breach.

These two types of losses can be illustrated with an example from *Hobbs*. The promisee and his family were left at a remote railway station, further from their house than they would have been had they been transported to Hampton Court Station. However, they had no other option but to undertake this lengthier walk. At this late hour, there was no alternative transportation nor any available lodgings, so if they did not want to spend the night outdoors, they had to continue their journey on foot. The normal loss in this case relates to the promisee's inability to reach his house by a short stroll. But in addition, it so happened that it was a cold and rainy night and the promisee's wife, being exposed to such unfavourable conditions, became ill. This was not an immediate consequence of her being left at Esher Station. Rather, it followed from her longer night walk in the rainy and cold weather. These further losses are considered to be due to the specific circumstances of the individual case.²⁹⁷ The aim that the promisee wanted to achieve with the contractual performance was to be able to walk to his house from a particular railway station. However, aside from the fulfilment of this aim, it could be supposed that he would also want to spend the night in the comfort of his house and have a proper rest. All these subsequent aims were achievable only if the contractual aims were attained.

Another example of consequential non-pecuniary losses can be found in *Watts*. The promisees wanted to buy a property which did not need substantial renovation. Due to the promisor's failure to provide correct information about the true condition of the property in his report, this did not happen. The promisees were then forced to commence essential renovation of the house which lasted for a significant period of time. During these refurbishments the promisees not only had to suffer the inconvenience of living in an unfinished property, in which various construction works were being done,

²⁹⁵ cf. the present chapter, section A, subsection c, part iv.

²⁹⁶ *McGregor on Damages*, op. cit., para 4-002.

²⁹⁷ *McGregor on Damages*, op. cit., para 4-018.

but they were also unable to entertain their friends and business partners there as they had planned.²⁹⁸ This affected their social standing and caused further pecuniary losses too. This was not an immediate consequence of the breach itself. It followed indirectly, as a result of the adverse effects of the necessity to undertake the essential refurbishment of the house. It would have not been needed had the promisor performed the contract as stipulated. The promisees' contractual aims were to be able to acquire a property that did not need substantial renovation works. Further to that, they had some subsequent non-pecuniary aims whose attainment was possible only if the contract was performed as promised – the ability to spend their weekends in the property, to enjoy its tranquillity and equanimity after the busy working week and to be able to invite other people there too.

Further examples illustrate situations where non-pecuniary losses might be inflicted, not as an immediate consequence of the contractual breach, but as a result of other losses. Transportation to the airport may not lead only to missing a plane, it could also result in the promisee's inability to attend an important family event to be held at the destination. An inadequate repair of the wooden carving of the doors and windows in an old historic mansion might deprive its owner of the pleasure of enjoyment of their artistic qualities, but it might further lead to his being unable to organise a birthday reception there too. A photographer who fails to attend a wedding might not only deny the promisee a depiction of this memorable family event, but could also cause disappointment, vexation and even frustration. In such cases the promisee's contractual aim was not only to have photographs of the wedding, but also to avoid suffering emotional harm as a result of the breach.

Some authors²⁹⁹ think that the distinction between normal and consequential losses can be drawn by reference to their predictability in a particular contractual relationship. Normal losses are those supposed to be caused in all agreements of a specific type. Thus, in a contract for a survey intended to provide information for a prospective purchase of a property, certain types of losses are possible. But there may also be additional particular losses which reflect special circumstances of the contractual relationship. Although the present work examines the nature and the possible classification of non-pecuniary losses elsewhere,³⁰⁰ and it does not explore any methods for their limitation, including foreseeability,³⁰¹ at this point it is important to note that in any agreement the promisee will have a specific contractual interest that is related to his aims and not to the type of the agreement. Some of these aims are achieved directly as a result of the performance and in that respect, they might be characterised as unavoidable or even inevitable consequences of the breach. The subsequent aims that the promisee has will indeed reflect the particular circumstances of the contractual relationship just as the contractual aims do. The distinction between these two groups of aims should be sought in their causal relationship rather than in their ability to reproduce the specific purposes that the promisee endeavours to attain with the contract. The consequential aims are only achievable as a more distant outcome of performance, while the primary contractual aims as explored in the present chapter are the immediate result that is attainable when the contractual subject matter is rendered as stipulated by the parties.

²⁹⁸ *Watts, op. cit.*, at 1427.

²⁹⁹ *cf. McGregor, op. cit.*, para 3-008.

³⁰⁰ *cf. chapter 3, section B, subsection c, part ii.*

³⁰¹ For foreseeability of losses *cf. Chitty, op. cit.*, para 26-119.

(ii) Distinction between consequential pecuniary and non-pecuniary losses

It has been concluded³⁰² that in all cases where the promisee pursues non-pecuniary aims, he would have non-pecuniary interest and as a result of an eventual non-performance, he will suffer non-pecuniary losses. It could be similarly asked how it is possible to determine the contracts in which consequential non-pecuniary losses might be caused. There are no works in English legal literature that explore this question even accidentally. One possible reason for this might be the incorrect understanding that all consequential losses are of pecuniary nature.³⁰³ On the other hand, similarly to the principal question concerning the distinction between normal pecuniary and non-pecuniary losses, this query might not have been considered to provide further ground for examination of the nature of these losses. The present part of this subsection continues the analysis that has been employed in the preceding sections of this chapter³⁰⁴ and it examines the possibility of the subsequent non-pecuniary contractual aims to predefine the type of losses that would be inflicted.

The type of losses that are suffered as a result of breach should not be seen only as an outcome of non-attainment of the primary contractual aims. The consequential character of the losses which are caused by other harms does not change their non-pecuniary nature. The consequential and the non-pecuniary essence of these losses are two separate characteristics which exist independently. The consequential nature of the harms should be defined by their indirect relationship with the breach – they are its more distant outcome. This does not affect their pecuniary or non-pecuniary character. The type of causality between the non-performance and the infliction of losses does not determine their non-pecuniary essence. It has been established that the non-pecuniary nature of the harms is not dependent on the mechanism by which they were caused.³⁰⁵ In particular, it has been observed that, for losses that are a direct and immediate consequence of the breach, this does not in any way predefine their pecuniary or non-pecuniary character. All non-pecuniary harms can be inflicted in an identical way regardless of their direct or consequential nature. They can all be caused in cases where the promisee does not achieve certain non-pecuniary aims. If these non-pecuniary aims are of a subsequent nature, which will be in all cases when they are achievable as a result of other contractual aims, then the losses that would be caused will be consequential.

A more detailed look into the structure of the contractual relationship could illustrate this proposition. If a construction of a house is commissioned, then the promisee's aims will be related to obtaining an ownership of such a property.³⁰⁶ Furthermore, this construction will typically contain some further requirements which reflect the personal preferences of the commissioner. It might also include the construction of a specific hall where the promisee might want to exhibit his rare collection of Romanesque enamels and ivories. In doing so, he pursues two separate aims – to be able to enjoy his collection in its entirety and also to organise small groups of visitors, who will pay for admissions, allowing him to make some profit. These two aims are not immediate consequences of the contractual performance – they are only achievable as its more distant results and both involve further actions that are to be performed by the promisee or third

³⁰² *cf.* the present chapter, section A, subsection c, part iv.

³⁰³ *cf.* McGregor, *op. cit.*, para 3-008.

³⁰⁴ *cf.* the present chapter, section C, subsections a and b.

³⁰⁵ For further argumentation about the inability of the breach to define the nature of the losses *cf.* chapter 3, section A, subsection a of the present work. The opposite views are examined in the following chapter 3, section A, subsection a, part iv.

³⁰⁶ *cf.* a similar example in the present chapter, section B, subsection b, part i.

parties. In the first instance the promisee must have or acquire such an art collection and should make further efforts to arrange it in the designated room. He might also need some special air conditioning that prevents the adverse weather effects on the fragile pieces of art. Without preliminary fulfilment of these conditions, achievement of the subsequent contractual aims will not be possible. The performance of the agreement will not be sufficient.

This however does not change the type of losses that will be inflicted if the house was not built as stipulated. The promisee's aim of enjoying his art collection is of non-pecuniary essence because it is not concerned with securing any increase in his patrimonial wealth. Its nature is not changed as a result of its more distant relationship with the contractual subject matter. Despite not being a direct outcome of the performance, its effects are no different from those that follow when the promisee is deprived of his immediate non-pecuniary aims, like his ability to live in his house. In both cases the losses that would be caused will be non-pecuniary. These types of losses will not be predetermined by their causal relationship with the breach, but instead it will depend on the aims that the promisee was unable to achieve.

This conclusion can be supported with a further argument from the preceding analysis where the importance of the contractual aim was established.³⁰⁷ It was concluded that there are no other elements of the contractual relationship whose presence can determine the type of losses that are inflicted in the event of breach. The argumentation which was employed there is equally applicable to consequential non-pecuniary losses. The opposite conclusion – that the covenanted subject matter defines the nature of the losses that may be suffered – cannot be supported simply on the basis that consequential losses are related more indirectly to the contents of the contractual relationship. The stipulated subject matter does not define the nature of the direct non-pecuniary losses despite its close correlation with the aims that are achieved with its rendering.³⁰⁸ Furthermore, the subject matter appears to be related even more distantly to any consequential non-pecuniary losses. Thus, if the covenanted subject matter cannot predetermine the nature of the losses suffered in cases where it is more closely associated with their causation, it is hardly likely to do so if its causal relationship with them is more distant. If the other possible elements of the contractual relationship are examined, similar arguments to those addressed already³⁰⁹ justify their inappropriateness for providing a criterion that differentiates consequential pecuniary and non-pecuniary losses. There is not any other element of the agreement apart from the promisee's contractual interest that determines the nature of his losses.

(iii) Subsequent non-pecuniary contractual aim

The promisee is not limited in how he might use the contractual result. As has already been noted,³¹⁰ aside from the immediate contractual aims that he attains as a direct consequence of performance, in many cases he will have subsequent aims that he endeavours to achieve as a more distant result of the agreement. These aims will not be attainable as a direct and immediate outcome of performance. In order to be fulfilled, they require a supplementary act of the promisee, a third party or they could result from the usual course of things. One of these possibilities can be

³⁰⁷ *cf.* the present chapter, section B, subsection b, part i.

³⁰⁸ For more detail about this correlation, *cf.* the present chapter, section B, subsection b, part ii.

³⁰⁹ *cf.* the present chapter, section B, subsection b, part iv.

³¹⁰ *cf.* the examples provided in the previous two parts i and ii of the present subsection above.

illustrated with examples from *Hobbs*. The promisee would have wanted to have an apposite night's repose after him reaching his house. This could only be possible if, as a result of a performance, he was able to walk from Hampton Court Railway station to his house. This is a consequential non-pecuniary aim which is achievable only as a result of the contractual performance and a further effort made by the promisee.

In other cases, additional acts by third parties may be required. In *Watts* the promisees wanted to be able to purchase a property that did not need substantial renovation, so that they could entertain their guests in it. In order to achieve this, their guests would need to visit the property and the promisees might eventually have to arrange an appropriate reception for them. Finally, certain consequential non-pecuniary aims are achievable only as a result of the usual course of things. It could be supposed that in *Hobbs* the promisee and his companions wanted to reach their house without being taken ill as a result of their exposure to unfavourable weather conditions during their long night walk. This would be more likely if the night was warm and it was not raining. In all of these cases the attainment of the subsequent contractual aims is possible as a consequence of the contractual performance and additional contributory factors which are not within the control of the promisor. Thus, the subsequent aims are a more distant and less certain consequence of the performance, which affects the regime of the recoverability of damages for the losses that would be incurred if these aims are not achieved.³¹¹

This more remote and less certain nature of the promisee's consequential aims does not undermine his entitlement to pursue them. On the contrary – he can rely on the agreement in full. His liberty to use the outcomes of the contractual performance is not subject to any limitations. Even if these aims are related to the agreement more remotely, one of the necessary conditions for their attainment is the delivery of the covenanted subject matter. The fact that the promisor might not be acquainted with the subsequent contractual aims does not affect their legitimacy. His obligation is simply to confer the stipulated contractual result. Besides that, the promisee is not obliged to communicate to him any further aims that he seeks to achieve since the promisor is not expected to be involved in their attainment. This is the main distinction that differentiates primary contractual aims from consequential contractual aims. The promisor might know the direct aims that are an immediate outcome of his performance, but not those that result from the consequences of his performance or the acts of the promisee, some third parties or the usual course of things.

Despite this, the subsequent contractual aims should be identifiable. For any contractual relationship, we should be able to determine what aims the promisee pursues. For the purposes of the present analysis it ought also to be possible to assess if they lead to enhancement of his patrimonial wealth. The identification of such aims is less dependent on the formation or the context of the agreement as compared to the promisee's direct contractual aims. In many cases the promisee decides to pursue certain subsequent aims after the inception of the agreement or even after the commencement of its performance. The identification of these aims poses some challenges, since the promisee may not communicate them to the other party for he is not required to manifest them in any particular way. At any point after the contract is formed, from the time when the other party comes under a legal obligation to provide the contractual

³¹¹ For more details about consequential non-pecuniary losses, cf. chapter 3, section B, subsection c, part iv. Generally about the recoverability of consequential losses, cf. e.g. McGregor, *op. cit.*, paras 4-018 *et. seq.*

subject matter, the promisee can choose to pursue certain subsequent aims, provided that they are a causal outcome of the stipulated contractual performance.

The last issue that the present part will examine is the dependency between the direct and consequential contractual aims. It has been concluded³¹² that in all contracts, regardless of the contents of the covenanted subject matter, the promisee might pursue a non-pecuniary aim. From the examples provided in the present subsection, it has already been seen that the consequential aims can be of non-pecuniary nature if the direct aims from whose attainment they can be achieved are non-pecuniary too. It has also been seen that subsequent aims pursued as a result of primary non-pecuniary contractual aim could also lead to an increase in his wealth. A further example might illustrate this. In *Hobbs* the promisee might have wanted to reach his house on time so that he was able to meet an important business partner in the morning. In this case the direct non-pecuniary contractual aim could lead to achievement of a subsequent pecuniary aim. The opposite situation should also be possible. The promisee might want to use his financial profit from a certain contract to achieve a subsequent non-pecuniary aim. In fact, this is even more common, since the increase in the promisee's patrimonial wealth will typically be pursued for the purpose of attaining further non-pecuniary aims, including enhancement of the promisee's personal comfort deriving from increased financial stability and security.

(iv) Consequential non-pecuniary contractual interest

The promisee has an interest in contractual performance beyond the immediate aims that he seeks to achieve upon delivery of the stipulated subject matter. This might be so as he does not only want to receive the covenanted result and use those of its beneficial qualities and properties which are available to him as an immediate outcome of the contractual performance. In many cases he may also like to make some subsequent modifications of the outcomes of the contractual performance, to use this result for his further purposes. In that respect the contractual aims, as they have been examined in the preceding parts of this work, are instrumental for attainment of the promisee's consequential interest. They are not an end of themselves but means which could lead to fulfilment of the pursued subsequent aims. Thus, the promisee might wish to attend a lecture in land law. His contractual interest would be to acquire knowledge on that subject. But along with that, he might also desire to learn property law in order to be able to resolve a prolonged dispute with his neighbours with regard to an alleged easement which interferes with his undisturbed usage of his land.

The consequential interest in his attendance of the lecture includes the primary contractual interest – obtaining specific knowledge of English property law – along with the subsequent aims that he wants to achieve – being able to use the acquired knowledge for resolving a legal dispute. In other words, the promisee's consequential interest includes the delivery of the contractual subject matter and all intermediate aims that lead to fulfilment of his subsequent aim. But, as noted in the preceding part, the subsequent contractual aim can be of non-pecuniary nature regardless of the contents of the intermediate aims. Then it can be concluded that the promisee might have a consequential non-pecuniary contractual interest even in cases where the direct contractual aims he pursues lead only to an increase in his patrimonial

³¹² cf. the present chapter, section B, subsection b, part i.

wealth. Thus, there is no direct correlation between the type of the primary aim and the consequential contractual interest in a single contractual relationship.

It has already been seen³¹³ that the only manner in which the promisee's contractual interest can be satisfied is by fulfilment of his aims. This can happen if the agreement is performed as undertaken by the promisor. This position can be illustrated even more clearly if the promisee's consequential non-pecuniary interest is examined. This is because the subsequent contractual aims are associated with the agreement more remotely and the result of their achievement is not dependent on the contents of the contract. In the example provided in the preceding paragraph, the promisee wants to resolve his dispute about an easement with his neighbour. He is neither interested in receiving the monetary equivalent of the lecture nor would he like to get back the amount that he paid for it. His contractual aim is achievable as a result of performance, but his interest is not derivable or equivalent to any other elements of the agreement like his counter-performance, its monetary equivalent or the market value of the promised contractual benefit. Indeed, there is no causal relationship between any of these three elements and the consequential aim that the promisee wants to attain.

His interest is achievable through the exact contractual performance, but his consequential aims can be accomplished eventually via other routes. Thus, the dispute with the neighbour might be resolved in many other ways – there could be a special agreement that settles it or an action before the court might be commenced independently of the promisee's desire to study some of the theoretical aspects of the issue. Hence in all of these examples the consequential contractual aim – resolution of the legal dispute – could be fulfilled. However, the subsequent contractual interest requires more than this, for it also incorporates the route via which this outcome is achieved. This is particularly true for the attainment of subsequent aims. Their correlation with the contractual performance is more remote and thus allows for a larger number of alternative means that could possibly lead to accomplishment of these aims. Hence the promisee chose the particular contractual subject matter in view of his preferred manner in which his consequential aims might be reached. Alternative routes that lead to an attainment of these aims would not satisfy his consequential non-pecuniary contractual interest.

The consequential non-pecuniary interest can vary greatly, and its content is not identical to the stipulated subject matter. It has already been submitted³¹⁴ that the contents of the primary contractual interest differ from the promised contractual benefit. In an agreement for transportation service, the promisee's interest was to be able to walk to his home from the destination to which he was supposed to be carried. The connection of the consequential interest to the contractual subject matter is even more distant. If the same example is used, the promisee's further interest was, for example, not to contract any illness while walking to his house. In other cases, the promisee's consequential non-pecuniary interest could be the preservation of his mental well-being, or avoidance of vexation, frustration or disappointment, as a result of the attainment of his primary contractual aims. This could be pursued in an agreement whose subject matter does not directly serve such aims or even where the promisee's primary contractual interest is pecuniary. This is possible, as it has already been suggested, because the pecuniary nature of the primary contractual interest does not predefine or limit the contents of the consequential non-pecuniary interest.

³¹³ *cf.* the present chapter, section C, subsection b, part iv.

³¹⁴ *cf.* the present chapter, section A, subsection a, part ii.

Conclusion to subsection c

The primary and consequential non-pecuniary contractual interests have parallel natures and effects. They both express the promisee's aspiration in achieving an outcome of the performance which leads to something other than a mere increase in his patrimonial wealth. Their content is also rather identical. Both types of interest are achievable if the agreement is performed as stipulated and, as a result of this performance, all further aims pursued by the promisee are attained. Neither the primary nor the consequential contractual interest is replaceable by payment of a certain amount of money. Such a payment would lead only to an enhancement of the promisee's financial position – something which would be entirely inconsistent with the aims that are forming this interest. For these similarities and identical effects, the distinction between primary and consequential contractual interest could be less important, especially where the type of losses is identified.³¹⁵

Despite these similarities, the primary and consequential non-pecuniary contractual interests also demonstrate certain differences. In both cases their content is highly dependent on the aims that the promisee pursues with the stipulated performance, but the origin of these aims is different. The achievement of the subsequent contractual aims is a more remote result of the performance and it is also reliant on other factors beyond the conferral of the subject matter of the agreement. As will be examined later in the present work,³¹⁶ this is reflected in some differences in the recoverability of damages for such losses.³¹⁷ Despite that, the importance of the consequential non-pecuniary contractual interest should not be undermined. First, its protection is important with regard to the principle of freedom of contract. The parties' autonomy to define the content of their agreements freely extends to their liberty to use their outcomes with no restrictions. This includes some of their more remote results which are further consequences of the delivery of the covenanted subject matter. Second, the binding force of contracts requires the promisor to provide the stipulated performance as agreed and it further allows the promisee to rely on this, including with regard to some of its more distant outcomes.

Conclusion to section C

One of the two elements that comprise the contractual interest is the subject matter of the agreement. This is the result that the promisor must provide to the other party in order to be discharged from his obligation. It is also the necessary premise which leads to achievement of the contractual aim pursued by the promisee. Apart from this, there are no other elements of the agreement that are able to determine the promisee's interest in the performance. The value of the counter-performance that he is obligated to provide is not equal to the covenanted subject matter which he is entitled to receive. Typically, the higher value of the performance that is due to the promisee is the reason for which he concludes

³¹⁵ This however will not be true in other cases, where the assessment of damages for such losses is concerned. *Cf.* generally for assessment of damages for non-pecuniary losses Zlatev, Z., 2020. Quantification of damages for non-pecuniary losses (*forthcoming*).

³¹⁶ *cf.* chapter 3, section B, subsection c, part iv. More generally about the recoverability of damages for consequential losses, *cf. e.g.* McGregor, *op. cit.*, paras 4-018 *et. seq.*

³¹⁷ The questions about remoteness of damages exceed the scope of the present research. For more details about remoteness, *cf.* Chitty, *op. cit.*, paras 26-119 *et. seq.*

the contract. Similarly, a monetary evaluation of the promisor's performance would not reflect the additional value that the other party sees in the receipt of the stipulated subject matter and therefore it will not be an adequate reflection of the promisee's contractual interest. As he wants to obtain the covenanted contractual benefit, his interest is not in reimbursement of his expenses made in reliance to the expected performance. Despite that, the promisee's interest in performance cannot be understood fully if the aim that he strives to achieve with the agreement is not taken into consideration.

The contractual aim defines the scope of the interest that the promisee has in the performance. The analysis advanced in the present section explores cases where the aim leads to something other than a mere financial enrichment of the promisee. It looks into the role of the agreement in satisfying other purposes than being a mere source of financial profits to the promisee. The importance of these sort of agreements has been largely underestimated in the English legal literature and case law. This has also led to a rather limited perception of the nature of the contractual interest. The complexity of the nature of this interest has also been conceived in a different way in the present section – the promisee's interest can be satisfied only when he achieves his aim through performance of the agreement as it was stipulated by the other party. Otherwise the fulfilment of the contractual interest is not possible. The attainment of the contractual interest happens neither in cases of performance which does not lead to achievement of the promisee's aim, nor when the aim is accomplished without exact performance.³¹⁸ Both the subject matter and the aim of the agreement are needed in all cases so that the promisee's contractual interest is satisfied in full.

Another aspect of the promisee's non-pecuniary contractual interest relates to the subsequent aims that he pursues. They are achievable as a result of the primary aims and comprise the consequential non-pecuniary interest that he has in the performance. In English contract law there has always been a distinction between normal and consequential losses, although it has not been perceived in the way in which the present section represents it. This differentiation is applicable to non-pecuniary harms too, but there has not been a principle by which this could be made. It has been submitted that the distinction between consequential pecuniary and non-pecuniary losses can be identified only if the promisee's contractual interest is taken into consideration. In cases when he pursues a subsequent non-pecuniary aim, and thus has a consequential non-pecuniary interest, he may suffer consequential non-pecuniary losses. Their non-pecuniary character does not depend on the nature of the normal losses from which they result. The promisee can suffer normal pecuniary losses and consequential non-pecuniary losses as a result of a single breach of contract. This is due to his ability to pursue various types of aims within the same contractual relationship. In turn, this possibility expresses the complex nature of the promisee's interest in contractual performance and its ability to define the consequences of the breach entirely on its own, without the interference of any other elements of the contractual relationship.

One of the advantages of the analysis adopted in the present section relates to the new functions that the contractual interest serves. In cases when the promisee cannot achieve his non-pecuniary contractual interest, he suffers non-

³¹⁸ Although this is beyond the scope of the present chapter, it could be added that in cases where exact performance doesn't lead to achievement of the promisee's aim, there is no breach and so no liability. In cases where there isn't exact performance but the promisee's aim is nonetheless achieved, there is breach and hence liability, but no loss, and so only nominal damages are payable. *Cf.* further about nominal damages: Chitty, *op. cit.*, para 26-010.

pecuniary losses. Furthermore, if the promisee has a consequential non-pecuniary contractual interest, then the losses that would be caused to him are of a consequential nature as well. More generally, the nature of the contractual interest will define the type of harms that are caused by breach in all cases. There is no other element of the contractual obligation or relationship that is able to do so. Furthermore, no authors have described the importance of the two constitutive elements of the contractual interest – the subject matter and the aim – with regard to their ability to determine the promisee’s motivation for formation of the agreement. While most legal scholars see this interest as a measure of damages, the present work examines its much closer relation to the contents of the contract. In other words, the type of losses that may be suffered is dependent on the manner in which the parties design their agreement at the time of its inception. Other subsequent circumstances in its life cycle, including the breach, are capable of determining neither the consequences of the non-performance, nor the types of losses that are sustained.

Conclusion to Chapter Two

The analysis employed in the present work aims to explore the contractual relationship from the perspective of its constitutive elements and their further interactions with each other. The non-pecuniary contractual interest has been seen as comprising the stipulated subject matter and the aim that the promisee would endeavour to achieve with its delivery. Despite the complex correlations that could exist between the various composite elements of the agreement, the contractual interest is not related to any of them. It has been submitted that it cannot be substituted with a disgorgement of the counter-performance that the promisee is obligated to provide to the other party or with its pecuniary equivalence. Similarly, the promisee’s interest in the agreement cannot be encompassed by a market evaluation of the covenanted contractual subject matter. Even if an additional amount to this assessment is added, so that it incorporates the enhanced subjective value that the performance might have to the promisee, he would still receive something different than the contractual benefit agreed initially. The contractual interest has a dynamic and complex structure, which is not related to any of the other elements of the agreement but depends entirely on the relationship between its own components – the stipulated subject matter and the aims that would be achieved with its delivery.

In English legal theory the concept of contractual aim is new, but in practice in every agreement the promisee pursues a certain outcome that is achievable as an immediate result of the performance. Sometimes the parties agree directly what the promisee’s aim is, and in other cases the circumstances of the contractual formation or the nature of the subject matter of the agreement are so conclusive that the aim can be derived from them immediately. The promisee could also specify the aims that he wants to achieve at any time when it could be needed. This is possible due to the specific causal relationship that exists between the aim and the subject matter of the agreement. When the promisor covenants to provide a certain contractual result, he ought to be aware of all feasible outcomes that would result from its rendering. The aims of the agreement would be achievable automatically as consequences of the performance, and the promisee should be entitled to enjoy all of them. Both pecuniary and non-pecuniary aims can be pursued in a single contract. This possibility determines the wide scope of the contractual interest that the promisee might have in the performance.

The contractual interest in its various forms as seen in this chapter expresses all advantages that the promisee can enjoy as a party to an agreement. The fulfilment of his interest is the only reason for which he concludes the contract. The notion of contractual interest provides a robust and persuasive starting point from where the consequences of the breach could be approached. It is a sufficiently plain concept with clear characteristics and functionalities, and it represents an interesting novel perspective through which the origin of non-pecuniary losses is traceable. The placement of the contractual interest in the centre of the present analysis provides a logical link between the content of the obligation as it is agreed between the parties at the contractual formation and the consequences of the breach. Their agreement includes the promisee's non-pecuniary contractual interest which in turn determines the presence of the non-pecuniary losses. The non-pecuniary interest can exist in all sorts of agreements regardless of their subject matters or the type of their parties. Even a corporation in a contract with a purely material subject matter can pursue some artistic or benevolent aims. If the promisee aims to achieve something further than a sole enhancement of his financial position, then he would have a non-pecuniary contractual interest.

The study of the contractual relationship before its non-performance can provide extensive information about many of its features that previously were either not explained at all or whose description was related erroneously to other concepts or principles. The distinction between pecuniary and non-pecuniary losses is one of these features. Its dependency on the agreed contractual subject matter and the aim that the promisee pursues with the performance fits neatly within the consensual nature of the contacts and thus confirms the plausibility of the method³¹⁹ adopted in the present work. In this thesis a particular subordination and interdependency of contract law principles has been regarded as an appropriate and indispensable approach to all contract law queries. This new perspective on the contents of the agreement affords other advantages too. It provides an opportunity for a more detailed and comprehensive examination of certain features of the contractual obligation like the relationship between the losses and its subject matter. Without them any scholarly work on the possible approaches towards recoverability of damages for non-pecuniary losses would not be possible. The aim of the following chapter will be to continue this study by exploring the changes that occur in the agreement after its non-performance.

³¹⁹ *cf.* chapter 1, section C.

3. Contractual relationship after breach

Introduction to Chapter Three

Non-pecuniary losses can be caused only in agreements where the promisee's aim is to attain something else apart from an increase in his patrimonial wealth. If the contractual relationship is performed as promised and he achieves his non-pecuniary aim, he will not suffer any harms. In a number of cases this does not happen. The other party does not provide the stipulated subject matter and the promisee's non-pecuniary contractual interest is not satisfied. He therefore incurs non-pecuniary losses. The precise mechanism by which this happens has not yet been examined in the legal literature. Most authors explore the question of causation which aims to limit damages that are due in cases of breach,³²⁰ but do not explain the exact way in which the losses are inflicted. In particular, it is not clear how non-performance changes the structure of the contractual relationship, how it influences the extent and nature of the harms and if there are other forces that determine the consequences of the breach. Although it has been submitted that the non-pecuniary contractual interest defines the nature of the relevant losses,³²¹ it should be examined further how the promisee's inability to have his interest attained causes him non-pecuniary losses.

These various gaps in the legal literature will be addressed in the present chapter. Its aim is to provide a comprehensive and exhaustive analysis of the changes to the contractual relationship which occur as a result of the breach. It explores the precise mechanism by which these alterations lead to the infliction of non-pecuniary losses. It also aims to provide a new definition of non-pecuniary losses – something not done in the legal scholarship before. The main research question that the present chapter answers concerns the contents of the contractual relationship after its breach. It considers the alteration of the promisee's interest following the contractual non-performance. This question is divided into two sub-questions. The first addresses the effects of breach. It looks into the manner in which the non-performance leads to certain changes to the contractual relationship, including the non-pecuniary contractual interest whose non-fulfilment is the only reason for which these harms are threatened. The other sub-question is about the nature of non-pecuniary harms. It studies the structural changes to the contractual relationship which are caused as a result of the breach.

This chapter has two sections only. The first explores breach of contracts in which the promisee's aim is of non-pecuniary nature. It explains the essence of non-performance and how it affects the promisee's contractual interest. It analyses the exact mechanism by which non-pecuniary losses are inflicted. This includes the particular factual circumstances which pertain to breach, the effects that the breach has on the non-delivery of the stipulated subject matter and the transformative effects of the breach. Finally, the first section proposes a new understanding of the content of the non-pecuniary contractual interest. This concept has not previously been identified in the legal scholarship. The second section of this chapter examines non-pecuniary losses. It looks into their nature and their particular characteristics which differentiate them from other harms. It proposes a new definition of non-pecuniary losses – something not attempted in the literature before. It also suggests a new classification of these harms. It is based on the definition of non-pecuniary losses and marks an original and important addition to the existing legal scholarship.

³²⁰ *cf. e.g.* McGregor, *op. cit.*, paras 8-140 *et. seq.* and Chitty, *op. cit.*, paras 26-066 *et. seq.*

³²¹ *cf.* chapter 2, section A, subsection b, part i.

A. Breach of contract

Introduction to section A

There are significant changes to the contractual relationship following breach. Their source might be subject to a certain level of ambiguity or even controversy. It could be questionable what the ultimate force that transforms the rights and obligations of the parties before and after the breach is and how this influences the promisee's contractual interest – his entitlement to receive the stipulated subject matter of the agreement and to have his aims attained as a result of this. This lack of clarity and unambiguity is enhanced by a major gap that can be identified with regard to the question of contractual breach and its consequences. English law, along with other common law jurisdiction, has not attempted to explain the relationship between the non-performance and the contractual interest. The only connection between these two concepts has been perceived through the idea of the promisee's contractual interest as a measure of the compensation for the losses suffered as a result of the non-performance. The goal of the present section is to explore more thoroughly and comprehensively the connection between the non-performance and the contractual interest.

In particular, the present section aims to establish a more direct relationship between the content of the contractual interest before and after the breach. Its purpose is to examine the foundations and the rationale for the changes to the promisee's interest. In doing so, the analysis adopted in this section does not look at the possible compensation for his harms caused by the breach. Instead, it studies the content of the agreement in relation to the promisee's aspiration to achieve his contractual aim as a main motivation for the contractual inception. Three main gaps in the existing legal literature could be identified with regard to the essence of the promisee's interest after the non-performance of the agreement. The first concerns the nature of the breach and its effects upon the contents of this interest. There are no authors who have described the role of the non-performance in relation to the changes that the promisee's interest undergoes. The second gap concerns the scope and the essence of these changes. The contractual interest is usually described rather statically as it is perceived at some particular moment, presumably at the time of the formation of the agreement. The last major gap in the existing scholarship is with respect to the contents of the contractual interest. No author has previously thought that, after breach, the promisee's interest might not be the same as it was when the contract is concluded.

The present section addresses all of these gaps. Its main research task is to describe the content of the contractual interest after breach. It explores the reasons and the scope of the changes to the promisee's aspiration to attain the aim of the agreement. This study is supported by three additional research questions, whose purpose is to demonstrate the dynamics of the contractual interest during the lifetime of the contract and its adaptability to the changes that occur throughout this period. The first additional question concerns the relationship between breach and the harms that are caused by it. It challenges the traditional view that the manner of breach can determine the scope or the essence of the losses that the promisee suffers. The next question enquires into the relationship between these harms and the promisee's interest. In contrast to traditional theories, which examine the interest with regard to its ability to determine the extent of the compensation due to him, this question explores the opposite correlation – how these losses can shape

the contractual interest. The third additional question investigates the last remaining relationship of the main concepts employed in this section – between the contractual interest and the breach. It seeks to determine how the modified contractual interest responds to the non-performance of the agreement.

There are three subsections in the present section. The first one analyses the nature of the non-performance. It defines the circumstances that constitute breach and the way in which they affect the rights and obligations of the parties to the agreement. This subsection claims that the breach can trigger certain changes to the contractual relationship, but its effect is limited. The non-performance can lead to eventual transformation of some of the promisee's rights, but it is unable to determine their content and scope. The role of the non-performance is limited only to the initiation of these alterations, with their content always dependent on other factors. The second subsection explores the alterations to the contractual interest after the breach. It looks into the manner in which the elements of this interest – the subject matter and the aim of the agreement – are affected. It examines the various ways in which this interest can be fulfilled despite the non-delivery of the promised contractual benefit. It claims that the content of the interest after breach depends on the contractual subject matter and the aim as they existed at the time of the formation of the agreement. It then establishes a connection between the transformed contractual interest and the harms that are inflicted by the non-performance. The final subsection analyses the content of the contractual interest after the breach. It identifies its four different forms and explores their ability to address the harms that are suffered from non-performance.

(a) Nature of breach

Introduction to subsection a

The incident that initiates the most significant changes to the contractual relationship is the breach. Yet in the legal literature the source of these vast alterations is not clear entirely. It is sometimes thought that the breach itself is the premise that determines the contents and the extent of the consequences which follow from it.³²² This understanding is not shared in the present work. The aim of the present subsection is to examine the nature of breach and to explain its inability to determine the consequences of non-performance. Such an approach fills the existing gap in the English legal literature where no complete account of contractual breach exists. Even the leading textbooks on contract law do not engage in any discussions about the essence of the non-performance and its relationship with the outcomes that follow from it.³²³ The present subsection will explore the nature of breach as a fact that initiates a certain transformation of the contractual relationship. It is claimed that non-performance alone cannot do more than this and that the consequences of breach depend on the promisee's contractual interest.

The present subsection comprises five parts. The first defines the perspective from which the covenanted subject matter should be perceived. It argues that all contractual obligations, regardless of their type or contents, are always for the achievement of a certain result rather than for exercising particular skills or knowledge. The second part explores the

³²² *cf. e.g. Addis, op. cit.*, at 495.

³²³ Apart from Treitel, *op. cit.*, para 17-050, where it is said that '[the breach] looks obvious enough' but no further examination of its general nature is offered.

nature of breach as a failure to achieve the promised contractual result. It also examines the factual circumstances that pertain to breach. Its aim is to identify all instances which might lead to non-performance and to explain their relationship with the contents of the agreement. The following part explores the same question from the opposite end. Its purpose is to provide an account of all other events or states of affairs that lead neither to breach nor to performance, but which affect other promisee's interests that are outside of the scope of the agreement. The fourth part argues that the type of losses can never be determined by the manner of breach. It explains the irrelevance of the concept of manner of breach in general and claims that the only fact which can determine the consequences of non-performance is the fact of breach. The last part of this subsection explores the relationship between the breach and the contractual interest. It establishes that the non-performance cannot determine the type or the degree of the harms in any contractual relationship.

(i) Factual circumstances pertaining to performance

The contractual subject matter is the stipulated result that the promisor is obligated to provide to the other party.³²⁴ If the performance that is due to the promisee is viewed as a certain outcome that needs to be reached, it is fairly easy to identify the cases where the covenanted subject matter is not provided. The performance should be perceived as a goal that ought to be fulfilled and anything that does not amount to this outcome should be treated as some form of breach. As examined in the previous chapter,³²⁵ the subject matter of the agreement is the first element of a causal chain of events which leads to fulfilment of the contractual aim. If the performance is conceived as a certain result, its ability to evoke subsequent changes in that sequence of interrelated incidents that lead to achievement of the aim pursued by the promisee can be understood simply. The perception of the stipulated subject matter as a specific outcome does not alter the obligation that the promisor needs to perform. The content of the agreement is always determined by the parties and the representation of its subject matter as a specific result is a particular way of conceptualising it. Its factual contents as agreed at the time of the contractual formation is not affected by its legal conceptualisation or perception.

Nevertheless, there are some obligations that are thought to amount to a specific behaviour, effort, course of action or usage of a certain skill or care, rather than to achieve a determinate result. In such cases it might be thought that performance of the contractual subject matter does not lead to a specific outcome but amounts to observing that behaviour or exercising the requisite care or skill. There are judicial opinions that such contractual subject matters are not obligations to bring about a certain result.³²⁶ On this understanding, we should distinguish the case where a surveyor of a property promises to provide an answer to a question about the possible levels of noise pollution affecting that property from a contract for the construction of a swimming pool, on the basis that no result was promised in the first case, while the second contract was for achievement of a specific outcome. This view should be challenged. A contractual obligation can always be represented as requiring the promisor to secure a certain result. Thus, an obligation to take care is an obligation to bring about the result that care is taken. In all cases, regardless of the manner in which the subject matter of the agreement is perceived, its content is a matter of contractual interpretation. The perception of the subject matter as a determinate result does not change its content as it may be derived from the contractual terms.

³²⁴ Thus, in Treitel, G., *op. cit.*, para 3-004.

³²⁵ *cf.* chapter 2, section B, subsection c, part iv.

³²⁶ *Per* Lady Justice Hale in *Graham Farley v Michael Skinner* 1999 WL 1048346, at 17.

The promisor breaches the agreement if he does not provide the stipulated contractual result without a lawful excuse³²⁷. Only those acts or omissions which lead to achievement of the contractual result can amount to performance. Their scope and content are matters of fact and depend on the particularities of each agreement. The promisee's contractual interest can be satisfied only if the stipulated result is achieved. In all other cases regardless of the efforts and skills that the promisor might have used, the contract would not be performed and the promisee's interest would remain unattained.³²⁸ Thus, in *Farley* the contractual result that needed to be conferred was the provision of a survey. There are certain reasons for which the services of the particular promisor were chosen. This might have included his skills, knowledge of the subject and general preparation on this matter. It might have been expected that these qualifications would be used for the final report to be sent to the promisee. But what mattered with regard to contractual performance was that the result that had been covenanted was achieved.

Therefore, the opinion expressed in the first decision of the Court of Appeal³²⁹ that this contract is not for a particular result, but rather its performance requires only the exercise of certain skills and knowledge, cannot be supported. It is stated that the promisor 'had [not] made any promise as to the actual state and condition of the property.' This is true, but it does not mean that the promisee did not make a promise to provide an accurate answer to a specific question. The decision further concludes that '...customers frequently ask surveyors to look into particular matters, either because they may affect the particular property or because they affect the particular customer but ... it has not hitherto been suggested that this alters the whole nature of the surveyor's duty and imposes upon him a liability to compensate for loss of amenity which he would not otherwise have. That would be tantamount to contracting for a result rather than to exercise reasonable skill and care'.³³⁰ It is true that there might have been an implied obligation addressed to the promisor requiring him to use his special proficiency in order to perform the contract, but this did not stand in place of his duty to provide a survey with particular contents. The promise he made was to present an answer to a specific question. This was the contractual result that he was obliged to deliver. Its achievement was possible via many routes. One of these supposed that the promisor would exercise reasonable care and to make enquiries of relevant third parties with regard to the question that needed to be answered. But it was also possible that he conducted his own research using different sources. Either way, his chosen source of knowledge does not amend his obligation to provide a truthful answer to a specific question, which was the result that he was obligated to bring about. He would have performed his contractual obligation if this result was achieved, but not if an unsuccessful effort for its attainment was made.

Contractual performance always, therefore, amounts to a certain outcome. Its achievement is the only result that can lead to satisfaction of the promisee's contractual interest. All intermediate factual or legal steps which lead to fulfilment of the stipulated outcome are, however, irrelevant with regard to the promisee's contractual interest. They are not constitutive elements of that interest and their separate existence does not serve the promisee in his entitlement to receive the bargained-for subject matter. In *Farley*, even if the surveyor had made certain enquiries about the flight

³²⁷ Treitel, *op. cit.*, para 17-049 and 17-059 *et. seq.*

³²⁸ *cf. e.g.* Treitel, *op. cit.*, para 18-074.

³²⁹ 1999 WL 1048346, at 16.

³³⁰ *Ibid.*

paths which could affect the property, but he had offered no decisive conclusion about the possible noise pollution of the area, the promisee would have not received the performance he was due. He is interested only in the final result and the other party might have been exempted only in case of frustration or other factors that could defeat his contractual liability. For this reason, anyone could perform the contract³³¹ despite the parties' opposition, unless it is intuitu personæ.³³² Indeed, all factual circumstances that contribute to performance are not relevant to the promisee's contractual interest. The only fact that has any significance is the achievement of the stipulated result. This leads to satisfaction of the promisee's interest so long as his contractual aim would be achieved.

(ii) Factual circumstances pertaining to breach

An examination of the leading authorities and texts on English contract law does not reveal if the specific factual circumstances that lead to breach can determine its consequences. It seems that there is some judicial support for the understanding that the particular manner of breach³³³ might affect the promisee's contractual interest and thus, influence the type or extent of the harms that he suffers. Before a more detailed analysis of this view is offered,³³⁴ it is useful to explore what possible factors may have any effect on the consequences of non-performance. In particular, the aim of the present and the succeeding part of this subsection is to demonstrate that no facts that occur after contract formation can in any way determine the consequences of breach, including the type and the extent of the losses sustained. If this proposition is justified, then it might be concluded that it is the promisee's contractual interest alone that defines the nature and the scope of the harms which are caused.

A general examination of the factual circumstances that lead to breach may be problematic for at the time of contractual formation it is not easy to provide a comprehensive list of all acts or omissions that could amount to non-performance. They are always matters of fact and depend on the specific circumstances of each case. They include any state of affairs which in fact would lead to non-achievement of the stipulated result. Thus, if a picture is commissioned, the factual circumstances in which non-performance of the agreement could occur would include all conceivable acts or omissions, done wittingly or unwittingly by the promisor, which at the time of the performance in fact preclude delivery of the covenanted subject matter. These various factual circumstances could amount to the blatant promisor's unwillingness to perform but might also include his carelessness in following the other party's instructions for delivery of the agreed subject matter. Thus, e.g., instead of getting the work under way, he might choose to spend the time in which his performance is expected at his seaside villa engaged in alternative activities. He might also make a genuine effort to paint the picture but, due to his forgetfulness, he uses predominantly beige shades despite the explicit promisee's request not to do so. The list of facts that might lead to a failure to perform is very specific to each contract and will be long and diverse.

³³¹ Treitel, *op. cit.*, para 17-008 and 17-009.

³³² *Ibid*, para 17-010.

³³³ The present chapter examines the breach only with respect to the cases for which the promisor does not have any lawful excuse not to perform. For other cases *cf. e.g.* Treitel, *op. cit.*, para 1-004 *et. seq.*

³³⁴ *cf.* the present subsection, part *iv.*

Despite this, all of the various acts or omissions that could lead to non-performance of an agreement cannot define the nature or the consequences of the breach. Their role is limited only to causing breach. In *Farley* the promisor failed to produce the survey on whose basis the other party was planning to decide if he should buy the property or not. The surveyor did not make the necessary enquires that would have determined the level of noise pollution. It is immaterial for the fact of breach and its consequences what the specific factual circumstances of the promisor's non-performance were. Thus, it might be imagined that the surveyor had made all proper enquiries and had determined that the property was likely to be affected by considerable aircraft noise but nonetheless failed to incorporate these findings in his final report. This would have also led to breach and would have made no difference to the promisor's liability. In both cases the harms caused to the other party would be identical. For the same reasons the analyses of *Ruxley* do not explore the state of affairs which led to the swimming pool being built with lesser depth than stipulated. They are important only for establishing the fact of breach and, since this was not a subject of disagreement between the parties, they were not examined by the court.

The promisee's contractual interest as it has been studied in the preceding chapter³³⁵ comprises the stipulated subject matter that is provided by the performance and the aim that is achieved as the immediate outcome of delivery of the covenanted subject matter. The only conceivable way in which the breach might impact the contents of the contractual interest is by affecting one of its two constitutive elements. However, neither of them is altered by the particular circumstances that lead to non-performance. The achievement of the contractual aim depends on the provision of the stipulated subject matter. In case of breach performance is not provided but the particular factual circumstances that lead to it are entirely irrelevant to the existence of this incident. The breach cannot be subject to material or quantitative qualifications; it either occurs or not. When it does, it may be subject to further qualifications which are referred to as defective performance.³³⁶ Even in agreements where the performance differs with respect to its quality, quantity or time, the degrees or nuances of such deviations are not relevant for the fact of breach. Thus, if the performance is not provided on time, it is delayed entirely and there are no quantitative qualifications with regard to such a defective performance. It is immaterial to the fact of breach if the covenanted subject matter is provided a day or a month later – in both cases there is a delay. In all of these instances the failure or refusal to perform does not alter the contractual interest of the promisee, but merely initiates a chain of events which follow as a result of the breach. The content of these changes is not determined by the non-performance – it depends on the contractual interest as it existed at the time of contract formation.

(iii) Factual circumstances pertaining neither to breach nor to performance

Two groups of facts which do not lead to non-performance and are still relevant to the contractual relationship might be identified. There are certain facts which do not constitute breach but could be perceived as able to affect adversely the promisee's contractual interest. These include specific acts or omissions done by the promisor which are not provided for in the contractual terms. Their occurrence was not envisaged by the other party so there were no express covenants with respect to their contractual effect. These cases include agreements where the promisee receives the promised

³³⁵ cf. chapter 2, section C.

³³⁶ cf. e.g. Treitel, *op. cit.*, para 17-056.

contractual result but cannot achieve his aim. Thus, he might request a room on the top floor of a hotel, having in mind, amongst other things, that he will have a pleasant view from his room. If he is given such a top floor room, he might find out that there are no windows, or the windows are so small so that no view is available. It might be supposed that this does not amount to breach, as the contract may not contain any implicit or explicit requirements with regard to the view from the hotel room. Then the fact that the promisee cannot achieve his contractual aim is due not to breach but to other facts. In such cases the promisor will not be liable for breach and the facts which led to the other party's inability to achieve his contractual aim have no legal relevance. Any additional facts that might negatively affect the promisee's contractual interest, but which do not constitute a breach of contract, do not lead to any liability on the promisor.

In *Addis* the promisee's right to act as manager was affected, which constituted a breach. Further to that, he was dismissed in a harsh and oppressive manner. This caused him a great deal of aggravation,³³⁷ but it did not amount to an additional breach, or at least this is the conclusion that might be derived from the judgments.³³⁸ One of them³³⁹ says also that the harsh manner in which the promisee's contract was terminated might constitute a tort and that a feasible claim based on this might provide an alternative route for recovery of the non-pecuniary losses the promisee might thereby have sustained. In other words, the judgment in *Addis* is based on the conclusion that facts which go neither to breach nor to performance are not relevant to that contractual relationship, despite their affecting interests of the promisee's similar or identical to those the agreement itself promotes.

In many cases facts which do not pertain to non-performance may affect the promisee's contractual interest. This is because this interest can be satisfied via other routes apart from the delivery of the stipulated subject matter. Thus, an employee claimed that termination of his contract in a discourteous and disrespectful way 'harmed his professional development, health, financial welfare and future employment prospects'.³⁴⁰ Like in *Addis*, the non-pecuniary losses claimed in this case were not caused by the breach of contract. They prevented the promisee from attaining his contractual aim and, thus, affected his contractual interest. Since this was not due to non-performance of the agreement, the other party was not liable in an action for breach of contract. There might have been alternative ways in which the promisees could have protected their interests, if the particular facts supported some form of non-contractual liability.

(iv) Manner of breach

Both cases of employees claiming damages for non-pecuniary losses deriving from the way in which their employment had been terminated make reference to the manner of breach as a potential factor that could establish liability on the other party. The concept of manner of breach is particularly important for the present work too, as it is usually thought³⁴¹ that it leads to damages for non-pecuniary losses which are irrecoverable. For a very long time such an understanding was thought to be a general bar for recovery of any harms resulting from breach of contract.³⁴² There is no clarity about

³³⁷ *Addis*, *op. cit.*, at 492

³³⁸ *Addis*, *op. cit.*, at 491

³³⁹ *As per* Lord Atkinson, *op. cit.*, at 495-96.

³⁴⁰ *Johnson v Unisys Ltd* [2003] 1 A.C. 518, at 518.

³⁴¹ Hahlo, H. R., 1972. Contracts – Sentimental Damages – Scotland. *The Canadian Bar Review*, LV, at 304.

³⁴² Blackshaw, Ian S., *op. cit.*, 255 – 256.

what the concept of manner of breach should include. It might be understood to comprise the circumstances surrounding the breach, including the harsh, oppressive, humiliating, or peremptory attitude of the non-performing promisor. The moral censurability of such situations does not provide sufficient grounds for concluding that the law should compensate the losses caused in such circumstances.³⁴³ There are some attempts in the legal literature to explore the differences between the manner and the fact of breach. One clarification that was made in respect of the manner of breach is that it represents the way in which the promise was broken.³⁴⁴

This implies that there are potentially multiple acts that might be accomplished by the promisor and which could constitute contractual non-performance. Amongst that multitude of acts, there is a specific act (or set of acts) that leads to non-performance. This act is the manner in which the contract was breached. In such an understanding the manner of breach is opposed to breach as an abstract or general concept. Breach in general would include all feasible ways which could have led to non-performance. In other words, the manner of breach is the peculiar or individual way in which the contractual promise is broken. Yet in the previous parts of the present subsection it has already been established that there is only one way in which this could happen. The individual factual circumstances of the non-performance are not relevant to the occurrence of breach. None of the authors who examine the notion of the manner of breach distinguishes the separate sets of facts that amount to breach. In light of the analysis in the preceding parts of this subsection, the manner of breach represents the additional circumstances accompanying the fact of breach, but it does not include the state of affairs that amounts to breach itself.

Some authors also struggle to establish the difference between the manner and the fact of breach. They take opinion that this distinction is attractive only conceptually but cannot be applied in practice because of the inextricable connection that exists between these two concepts.³⁴⁵ This view is entirely opposite to the one suggested in the present subsection. The fact and the manner of breach can be distinguished quite clearly. The lack of contractual performance is a single negative fact that represents the mere absence of the contractual result. It is very easily discernible from other acts or omissions, which might have occurred at the time when the performance was expected but which did themselves constitute breach. Even if these facts affect the promisee's contractual interest as understood in the preceding part of the present subsection,³⁴⁶ they do not constitute the contractual non-performance and cannot support any independent contractual liability. The practical difficulties that have been expressed by authors who do not distinguish the fact and the manner of breach are related to the lack of a clear understanding of the nature of breach and its effects with regard to the promisee's contractual interest.

(v) Relationship between breach and contractual interest

³⁴³ Collins, Hugh, 2004. Compensation for the Manner of Dismissal. *Industrial Law Journal*, 33(2), at 153.

³⁴⁴ Mitchell, Catherine, 2003. Promise, Performance and Damages for Breach of Contract. *Journal of Obligations and Remedies*, December 2003, at 77.

³⁴⁵ Phang, Andrew, 2003. The crumbling edifice? The award of contractual damages for mental distress. *Journal of Business Law*, 2003 (July), at 348 and 371.

³⁴⁶ *cf.* the present subsection, part iv.

The existence of the non-pecuniary contractual interest depends on the subject matter and the aim of the obligation and can be identified at the time when the agreement is concluded. The breach is a supervening fact that has no retroactive effect on the contents of the contract. It changes neither the subject matter nor the aim of the agreement. Hence, the breach itself does not determine the consequences which follow its occurrence. They depend solely on the promisee's non-pecuniary contractual interest. The breach is a negative fact that is always identical and consistent in its function. It is a mere lack of the due performance, which initiates consequences aiming to remedy the promisee in view of his contractual interest. Non-performance does not change the contents of the obligation and, if the promisee has no non-pecuniary contractual interest when the contract is concluded, the breach cannot introduce it. The view of some authors that 'the manner of breach influences the nature of the remedy'³⁴⁷ cannot be supported.

Any claim that the additional facts which do not constitute non-performance, but which determine its consequences has no reasonable explanation. So, it is sometimes claimed that the specific manner of breach is a reason why non-pecuniary losses might be caused. However, it is unclear how the manner of breach can cause non-pecuniary losses only and not pecuniary losses. Further to this, we might, on this view, question whether there are other types of breaches that cause different categories of losses. However, none has been identified. This contradiction has been noticed by other authors,³⁴⁸ but on a smaller scale. It has been noted that there is a difference between losses caused by the manner of dismissal and those deriving from breach of contract.³⁴⁹ It was argued that *Addis* does not limit the recoverability of damages deriving from contractual non-performance. The main question in the case was whether the losses deriving from the circumstances accompanying breach were recoverable in a contractual action. Naturally, and in accordance with the conclusions reached in the preceding parts of the present subsection, it was held that they were not.

Other authors³⁵⁰ are more persuasive in their understandings of the nature of contractual breach. They argue that non-performance can cause only economic losses while the manner of dismissal causes only non-pecuniary losses.³⁵¹ No explicit definition of the understanding about the manner of dismissal is offered but an example from the text could illustrate this. It is said that these are cases where 'the employer ... bullied and harassed an employee, causing great distress and humiliation'.³⁵² Why are these treated as losses resulting from the manner of the breach is not clear. The apparent implication is that if the losses are non-pecuniary, then they derive from the specific way in which the contractual relationship was broken. Although this issue is explored in the context of employment law, its argumentation is of a general contractual nature. The instances provided by the author where the promisee was treated in a 'harsh, oppressive, humiliating, or peremptory'³⁵³ manner, his 'harassment and bullying'³⁵⁴ represent facts which go to the breach itself. Nevertheless, the author describes examples of non-pecuniary harms as deriving only from the manner of

³⁴⁷ cf. Veitch, Edward, *op. cit.*, at 230.

³⁴⁸ Enonchong, Nelson, *op. cit.*, 617 – 640.

³⁴⁹ *Ibid.*, at 621.

³⁵⁰ cf. Collins, Hugh, 2004., *op. cit.* and Collins, Hugh, 2013. Compensation for Dismissal: In Search of Principle. *Industrial Law Journal*, 41 (2, 1 June 2012), 208 – 227.

³⁵¹ Collins, Hugh, 2004. Compensation for the Manner of Dismissal. *Industrial Law Journal*, 33(2), at 152.

³⁵² *Ibid.*

³⁵³ *Ibid.*, at 153.

³⁵⁴ *Ibid.*, at 154.

dismissal. This might be due to the perception of the judges expressed in the analysed cases that the particular form in which the non-performance occurred is the only source of this type of losses.

Any assumption that non-pecuniary harms flow only from the manner of dismissal rather than the act of breach is incorrect. If the manner of dismissal comprises acts which do not themselves amount to breach, then they are irrelevant to the contractual relationship entirely and unreservedly. Their single connection to the agreement is that they are occurring simultaneously with the facts which constitute its breach. This is not a sufficient ground for their association with the contract or with the consequences of its non-performance. The view that the manner of breach might cause non-pecuniary losses cannot be accepted for other reasons too. If it were true, it would mean that the consequences of non-performance are reliant on its particular factual circumstances rather than entirely on the contents of the agreement. No author has explained how this is possible. In such cases the breach needs to be able to achieve at least one of two possible outcomes. The first is to be able to amend the contractual interest and thus, supplement the contractual subject matter with something other than what was covenanted initially. The second option is if the non-performance could obliterate the contractual interest entirely and substitute it with something else. Hence it is rather doubtful if the promised contractual result could be changed for a different one as a result of the breach.

It has already been explored³⁵⁵ why theories that do not explain the origins of non-pecuniary losses by reference to the contents of the contractual interest collapse inevitably. The contractual interest comprises the subject matter and the aim of the agreement. Neither can be amended by a supervening event. The facts that are typically described as pertaining to a specific manner of breach do not usually constitute non-performance at all. Sometimes they may give rise to tortious liability and perhaps this is one of the reasons for their close association with non-pecuniary losses. The compensation of non-pecuniary losses deriving from torts has been established for quite a long time.³⁵⁶ This is not true about cases where the harms are caused by contractual non-performance. Thus, in order to justify the availability of damages for non-pecuniary losses many authors³⁵⁷ have been tempted to take a middle route. In these cases, the liability that was sought was neither found to be of tortious nature, nor was it claimed that the breach of contract itself inflicted the non-pecuniary losses. From a policy perspective this position might be attractive, but its theoretical grounds are too questionable, and this might have motivated the courts to reject it.

Conclusion to subsection a

There is no plausible theory that supports the idea that contractual breach determines the nature or the extent of the resulting losses. The acts or omissions that the promisor or a third party must perform in order to deliver the promised contractual result do not determine the content of the contractual interest. The non-performance encompasses the cases where this result is not conferred to the promisee. The particular factual circumstances that lead to the breach are not relevant with regard to the contractual interest either. Their importance is limited to their role in leading to the breach,

³⁵⁵ *cf.* chapter 2, section C.

³⁵⁶ Goudkamp, J., E. Peel., 2014. *Winfield & Jolowicz on Tort*. 19th ed. London: Sweet and Maxwell.

³⁵⁷ For a detailed review of the literature which examines the the manner of breach as being able to inflict non-pecuniary losses, *cf.* Collins, Hugh, 2013. Compensation for Dismissal: In Search of Principle, *op. cit.*, 208 – 227.

but beyond that they cannot affect the promisee's interest. It remains as it was at the time of contract formation. Similarly, there may be additional facts which occurred alongside the contractual breach, but which do not pertain to non-performance. Even if they might affect other interests of the promisee, they are alien to the contractual relationship and cannot affect it. Thus, the manner of breach which might in some cases support tortious liability, can never be perceived as some form of contractual non-performance. Despite the variety of facts that lead to non-performance, none can by themselves determine the consequences of the breach with respect to the promisee's contractual interest.

There are two main problems with theories which aim to justify non-pecuniary losses on the basis of facts which might or might not pertain to non-performance. The first is that they do not explain how particular supervening facts amend the contractual interest as it exists at the time of contract formation. The second deficiency of these theories is that they do not examine the effect that the breach has on this interest. The breach should be seen only as a triggering event, which gives rise, as will be explored in the subsequent subsections,³⁵⁸ to certain rights to compensation. Non-performance cannot be subject to any quantification or evaluation. It has no degrees or extents. It is always merely a lack of the promised contractual result which leads the non-achievement of the contractual aim. This lack is only a negative fact that does not supplement or amend the contractual interest. For these reasons the breach cannot have any influences on the type or the nature of the losses. It is only a necessary premise that initiates certain changes in the contractual interest, without being able to define their nature, extent or scope.

(b) Changes to non-pecuniary contractual interest after breach

Introduction to subsection b

The breach commences some alterations to the contractual relationship. However, their substance and scope are not dependent on the non-performance. They are defined by the contents of the contract as stipulated between the parties. As already explored, there are two central elements of the contents of the agreement which determine the promisee's contractual interest: the result that the promisor is obliged to provide and the aim that the promisee would achieve with the performance.³⁵⁹ The main argument that will be advanced in the present and the succeeding subsection will be that these changes lead to the infliction of losses. The main object of study will be the mechanism by which non-pecuniary harms are caused. There is a close correlation between the contents of the agreement and the nature of the losses that are inflicted as a result of the non-performance. This question has not previously been examined in the legal literature. Most authors³⁶⁰ state merely that contractual non-performance causes losses but do not explain in detail how and why this happens. The main research problem explored in the present subsection concerns the nature of the changes to the contractual interest following the breach and the manner in which they lead to the infliction of certain non-pecuniary harms.

³⁵⁸ *cf.* the present subsection, part v.

³⁵⁹ *cf.* chapter 2, section C.

³⁶⁰ *cf.* e.g. Chitty, *op. cit.*, para 26-001.

This subsection has five parts. They deconstruct the various aspects of the alterations to the contractual interest prompted by breach. The first part explores how the promisee's interest is affected when the stipulated contractual result is not provided. It supports the proposition that the mere lack of the covenanted subject matter causes no harms to him. The second part continues this analysis by explaining what further interests of the promisee are affected when non-performance leads to his inability to achieve his contractual aim. It looks to explain the nature of the harms inflicted as a result of non-attainment of the contractual aim. The third part provides an overview of the transformative effects of breach. It examines the response that English contract law provides to breach by introducing certain changes to the contractual relationship. These changes aim to lead to fulfilment of the promisee's interest via some alternative routes. The next two parts examine how this can be achieved in light of the existing remedial system of English contract law. The fourth part describes the ways in which the contractual interest can be attained if the accomplishment of the promisee's aim is still possible. The last part of this subsection studies the alternatives for satisfaction of his interest when it is no longer possible to achieve his contractual aim.

(i) Effects of breach with regard to non-delivery of the contractual subject matter

The promisee concludes the agreement as he wishes to achieve a specific contractual aim.³⁶¹ He has no separate interest in receiving the subject matter if his aim cannot be attained. The relationship between the subject matter of the agreement and the promisee's aim is so close that the rendering of the promised contractual result leads consequently to achievement of this aim.³⁶² Thus, in most cases, non-performance of the agreement would entail not only non-delivery of the stipulated subject matter but also immediate non-achievement of the promisee's aim. More generally, there are two possible outcomes of the breach. The first and most common will be the promisee's inability to achieve his aim. The effects of breach in these most common cases are examined in the following part of the present subsection.³⁶³ Along with this, the breach might have other effects too. Alternatively, however, despite the lack of the contractual subject matter, the aim of the agreement might be achieved. Although these cases have already been examined with regard to the nature of the relationship between the subject matter and the aim of the agreement,³⁶⁴ the present analysis explores them from the perspective of the harms that the promisee could suffer as a result of the breach.

Thus, in *Ruxley*, despite the breach, the promisee achieved his contractual aim to be able to dive safely in the swimming pool constructed by the other party. Nevertheless it was decided that he suffered "loss of amenity, inconvenience or loss of aesthetic satisfaction".³⁶⁵ There is a relatively modest description of the nature and the contents of these harms.³⁶⁶ It is said that "[i]n the event, Mr. Forsyth's pleasure was not as great as it would have been if the swimming pool had been 7 feet 6 inches deep."³⁶⁷ This assertion does not find any support in the facts of the case. There is no information that promisee has claimed that the depth of the swimming pool would provide any pleasure or other non-pecuniary benefits

³⁶¹ *cf.* chapter 2, section B, subsection a.

³⁶² *cf.* chapter 2, section B, subsection b, part i.

³⁶³ *cf.* the present subsection, part ii.

³⁶⁴ *cf.* chapter 2, section C, subsection b, part iii.

³⁶⁵ *Op. cit.*, at 353.

³⁶⁶ *Op. cit.*, at 373-75 *as per* Lord Lloyd of Berwick.

³⁶⁷ *Op. cit.*, at 374.

apart from the feasibility of safe diving. This unfortunate interpretation of the factual circumstances of the case might be due to the judges' feeling that, if the cost of reinstatement could not be provided as compensation, there must be some other redress available to the promisee. If from a policy perspective, the decision might seem justified, there are no arguments of principle that support it. The judgment contains no justification of the alleged promisee's harms that is related to the defective performance consisting in a construction of a shallower swimming pool.

Other examples could also illustrate similar positions where the promisee's non-pecuniary contractual interest would be attained entirely despite the non-performance of the contract. It could be imagined that, if Gatwick Airport had been closed or the flight paths over the county of East Sussex were altered, the aim pursued by the promisee in *Farley* would have also been achieved despite the breach. These cases illustrate instances in which the promisee's non-pecuniary contractual interest may be attained even if the agreement is broken. This is possible as the contractual performance is not always the only prerequisite that can lead to fulfilment of the aim pursued by him. In such cases the promisee may not have suffered any harms or other disadvantages as a result of the breach. On the one hand, he did not receive what he contracted for. On the other – he attained his contractual aims. They are the sole motivations for which he wanted to obtain the performance and, if this is achieved, then he has no other interest in receiving the stipulated subject matter.

One of the essential features of the subject matter of the agreement is its close correlation with the aim that the promisee wishes to attain. The delivery of the contractual result will generally lead to achievement of the aim and, thus, the promisee's interest will be satisfied. This close causal relationship makes the subject matter part of the contractual interest. The contractual result has no intrinsic value to the promisee. In cases where the promisee's interest is attained despite the breach, the close correlation between the subject matter of the agreement and the promisee's aim ceases to exist. In such instances his interest excludes the contractual result and consists only of the aim that he strives to achieve. It has been argued³⁶⁸ that the promisee concludes the contract only with regard to the feasibility of satisfying his contractual interest. This means that the agreement can have some adverse effects on him only if it affects his interest. In cases where the aim is achieved despite a defective performance, the breach does not have injurious effect on him. Therefore, it might be concluded that notwithstanding the non-performance, the promisee suffers no harms in the cases where his interest is satisfied otherwise.

There could be other cases³⁶⁹ where the promisee suffers no harms despite the breach. They are outside of the scope of the present analysis as in all of them his interest is not satisfied but other factors nonetheless decrease or entirely obviate the harms that he suffers as a result of the non-performance.³⁷⁰ In contrast to this, the present analysis concerns cases where no harms were caused at all. The general position of English law supports the conclusions reached in this part of the present subsection, namely that the mere fact of breach does not entail harm. Thus, it is said that "A breach of contract may cause a loss but is not in itself a loss in any meaningful sense."³⁷¹ The illustrations of this proposition

³⁶⁸ cf. chapter 2, section C.

³⁶⁹ cf. e.g. McKendrick, E., 1999. Breach of Contract and the Meaning of Loss., *op. cit.*, at 41, Peel, E., *op. cit.*, para 20-008 and Winterton, D., *op. cit.*, at 109.

³⁷⁰ cf. e.g. Chitty, *op. cit.*, para 26-103.

³⁷¹ As per Lord Clyde in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518 at 535.

described in the texts on contract law³⁷² do not provide an explanation of the reasons for this outcome. On the contrary, in light of the existing contract law theory where it is not sufficiently clear why the breach does not necessarily have injurious effects, one might think that non-performance should always cause harm. By contrast, the understanding adopted in the present work provides an alternative concept of contractual interest, based on the importance of the promisee's aim rather than on the role of the contractual subject matter alone.

(ii) Effects of breach with regard to non-achievement of the contractual aim

In the most common cases breach leads to non-achievement of the promisee's aim. This follows as a direct consequence of the close correlation between the covenanted subject matter and the aim as explored previously.³⁷³ It has also been suggested that the promisee has no interest in obtaining the result of the agreement where this would not lead to attainment of his aim. Thus, a breach which results in non-achievement of the promisee's aim should be expected to have certain adverse effect on his contractual interest. This in turn would cause him harms which would be direct³⁷⁴ or indirect³⁷⁵ consequences of the non-performance. The contractual aim is the measure that determines the injuries³⁷⁶ caused to the promisee as a consequence of the breach. All harms that follow from non-performance are inflicted in view of the non-achievement of the contractual aim. Put negatively, this also means that there can be no relevant harms caused to the promisee which are consequent on any other element of the contractual relationship. Thus, the subject matter of the agreement is not related directly to the existence or the extent of the injuries that the breach can cause to the promisee.

Some examples of cases where promisees were unable to achieve some of their non-pecuniary aims can illustrate this conclusion. In *Hobbs* the transportation service which was the subject matter of the agreement was of no interest to the promisee if it did not lead to attainment of his contractual aim – the opportunity then to walk home with his family. As an immediate result of the breach the promisee and his companions were compelled to walk a few miles to their intended destination during a drizzly and frosty night. Further to that, as an indirect consequence of the non-performance, the promisee's spouse contracted a cold. These detrimental incidents did not result directly from the promisee's transportation to the wrong station. The defective performance instigated these incidents, but it did not determine their harmful nature or extent. In other cases where the promisee is to be transported to a certain destination, the essence of the harm that derives from the breach would be different. Thus, he might miss his connecting train or an important business meeting. None of these instances would involve walking in unpleasant weather conditions. The specific injurious experience suffered by the promisee and his family in *Hobbs* is consequent on their aim to go to their house and spend the night there. This aim also limits the nature of the feasible harms that they can suffer. In *Hobbs* the promisee could

³⁷² *cf. e.g.* Treitel, *op. cit.*, para 20-008.

³⁷³ *cf.* chapter 2, section B, subsection b, part i.

³⁷⁴ *cf.* the present chapter, section B, subsection b.

³⁷⁵ *cf.* the present chapter, section B, subsection c.

³⁷⁶ In the present work the terms "harms" and "injuries" are used interchangeably and aim to denote the adverse effects on the promisee's contractual interest that follow as a result of the breach. For other understandings about these terms, *cf. e.g.* Winterton, D., *op. cit.*, at 109.

not claim that he missed an important business opportunity for the facts of the case did not support a contractual aim of that nature.

In *Jarvis* the promisee's aim was to have a pleasurable time during his winter holiday. As a result of the breach, he was deprived of this. The harms suffered by him amounted to "frustration, boredom and the discomfort of being unable to have communication with his fellows for a whole week".³⁷⁷ These are detriments which were consequent on the promisee's inability to attain his contractual aim. They resulted from his missed opportunity to have a particular pleasurable experience – the occasion to interact with other people, to have a delightful time, to be entertained by Swiss artists' performances and to enjoy fine skiing. All of these aims were achievable if the stipulated holiday was provided. Nevertheless, the harms suffered by the promisee were not consequent simply upon the non-delivery of the subject matter of the agreement. They resulted as a consequence of the unattainability of the aims that he pursued with the contract. An agreement for hotel services need not result in such harms as those identified in *Jarvis*. Thus, in many instances a vacationer would go on a similar holiday in the Alps to escape from the pressure and tensions of city living. In such instances the emotional or other non-pecuniary injuries that he might suffer would be of a different nature. They would follow from his inability to achieve these specific aims. They are not determined by the essence of the hotel service as described in the agreement.

This understanding can also be supported by an analysis of the facts in *Watts*. Due to the breach, the promisees suffered several detriments, including the inconvenience of organising the necessary repairs, not being able to use the house while the refurbishment works were carried out, and physical inconvenience and discomfort caused by the construction works. These are not harms which follow directly and necessarily from non-performance of a contract for the preparation of a structural survey of a real estate. Their nature and extent are defined by the promisee's contractual aims. A survey requires certain inspections and assessments of the property to be completed. The essence of these activities is not related directly to all of the harms that were suffered by the promisees. Wrong information about the physical condition of a house would not result necessarily and inevitably in the promisees' inability to entertain their guests in this property. This would happen only if the promisees had such plans in mind as an element of their contractual aims. The connection between the subject matter of the agreement and the harms follow from its non-delivery is established through the contractual aim. In *Watts* the inconvenience caused by the construction works was suffered as a result of the promisees' inability to achieve their aim – to buy a property which did not need substantial refurbishments.

This conclusion can also be supported by an analysis of *Farley*. In this case the contract had a near identical subject matter to the one in *Watts*, but the harms caused to the promisee were entirely different. This is so as they were determined by his aim rather than the subject matter of the agreement. The promisee wanted to enjoy the tranquillity and serenity of his countryside house. The non-fulfilment of this aim led to physical inconvenience and discomfort deriving from the significantly high levels of aircraft noise. Such detrimental effects are not consequent simply on the breach of the surveyor's contract. They followed from the individual aims that the promisee wanted to achieve with the agreement – to be able to choose a property that would offer a satisfactory level of serenity and calmness. The promisor had to

³⁷⁷ *Jarvis v Swans Tours Ltd.*, *op. cit.*, at 234.

ascertain a specific fact – whether the property was affected by aircraft noise. The nature of this obligation does not resemble the harmful results that followed from its non-performance. The injurious effects of the breach correspond to the content of the contractual aim. They consisted of the detrimental consequences following naturally and unavoidably from the promisee's inability to choose a house with certain qualities. His aim determined the content and the degree of the harms that resulted from the breach.

Although there is a separate section³⁷⁸ exploring the essence and contents of the losses resulting from breach, at this point the close relationship between the contractual aim and the harms following from the non-performance should be noted. There is no direct link between the nature of the stipulated subject matter and the injurious outcome of the breach. In a surveyor's contract the promisee can be disturbed by excessive levels of aircraft noise or by the inconvenience of having to live in a property where extensive refurbishing works have to be undertaken. In a contract for transportation services the promisee might be unable to enjoy the picturesque scenery of the agreed route or he might miss an important family gathering. The injurious nature of the breach is determined by the promisee's aim rather than the subject matter of the agreement. The harms that follow the non-performance reflect the promisee's inability to achieve his aim for which the contract is concluded. In all of the above examples the injuries that were inflicted result from the promisee's unfulfilled aims.

This understanding can be explained by the concept of contractual aim as explored previously.³⁷⁹ The promisee forms the contract not because he wants to obtain the contractual subject matter *per se*. Rather he desires to use some of its beneficial qualities or features, which are incorporated in the contractual aims he pursues. Thus, the promisee cannot suffer any harms from the mere lack of performance. As he does not aspire to receive the contractual subject for its mere existence, then its bare absence cannot affect his contractual interest. The harms that are caused to him follow from his inability to use the beneficial qualities or properties of the contractual subject matter. The aims which could be achieved as a result of the contractual performance are the reasons which prompt the formation of the agreement. Their subsequent unattainability leads to the harms that are suffered as a consequence of the non-performance. In other words, the injuries that the promisee suffers consist of his inability to use the beneficial qualities or features of the contractual subject matter. In cases where the breach or the defective performance does not deprive him of this opportunity and he is able to use them, and thus, achieve his contractual aims, he suffers no harms.

(iii) Transformative effects of the breach

As a typical³⁸⁰ result of the breach, the promisee's contractual interest will not be satisfied. The law cannot remain indifferent to this situation as it would undermine the binding force of the agreements. There are a number of remedies³⁸¹ which aim to make up for the harms that are caused from non-performance. The scope of the present work is limited

³⁷⁸ *cf.* section B of the present chapter.

³⁷⁹ *cf.* chapter 2, section B, subsection b, part i.

³⁸⁰ For the exceptions, *cf.* the present subsection, part i.

³⁸¹ *cf.* Burrows, A. (2019), *op. cit.*, at 130 *et. seq.*

only to those which lead to achievement of the contractual aim either directly³⁸² or indirectly.³⁸³ Along with these remedies, the promisee is also able to choose alternative ways in which he can seek satisfaction of his interests affected by the breach.³⁸⁴ As none leads to achievement of his aim, they will not be explored in the present work. The transformative effect of the breach, as will be examined in the present part of this subsection, includes all changes to the contractual relationship which result in satisfaction of the promisee's interest notwithstanding the breach. This could be conceivable as the breach cannot in itself make it impossible for the promisee's to achieve his aim via other ways than the agreed performance. The contractual relationship is changed in a particular fashion which allows for pursuit of the intended aims regardless of the fact that the other party has not performed his obligation.

The source of this transformation is the law. The changes to the contractual obligation aim to uphold the principle of the binding force of the agreement. Without these changes, the breach would prevent the promisee from having his contractual interest satisfied and would leave the achievement of his contractual aim entirely to the whims of the other party. The purpose of these changes is to provide alternative ways in which the promisee's contractual interest can be fulfilled. They are the remedy which the law invokes to ensure that contracts are performed as covenanted. This is the reason why the contents of these transformations are defined by the law itself. The role of the breach remains limited to its occurrence as a fact and the promisee's consequent inability to achieve his aim. At that moment the law intervenes by introducing certain alterations to the contractual relationship. They seek to uphold the promisee's interest by providing additional opportunities which could lead eventually to achievement of his contractual aim.

(iv) Fulfilment of the promisee's interest when the achievement of the contractual aim is still possible

If achievement of the promisee's aim after the breach is still possible, his main interest remains unchanged. The breach does not amend or revoke it. The promisee would still wish to receive the stipulated subject matter and use its beneficial qualities and properties as per his initial intentions at the time of contract formation. However, by way of an enhanced mechanism which provides more opportunities for satisfaction of the promisee's interest, the law creates additional alternative interests in receiving compensation as a substitutive subject matter³⁸⁵ or as an alternative benefit that may lead to achievement of his aim. The first of these two interests includes the promisee's presumed desire to obtain a substitutive performance from a third party. This interest covers the general cases where no contractual performance is provided at all. The second concerns instances where a completely different benefit is conferred than the one initially agreed, which still leads to achievement of the contractual aim pursued by the promisee. In both cases the outcome of the remedy is that the promisee's contractual interest is satisfied. If the performance is defective or incomplete, the promisee is thought to have two alternative interests. The first one is for compensation for the cost of obtaining a complete performance. The second one is for the difference between the value of the promised contractual subject matter and the value of the performance in its defective or incomplete state. The promisee's intention to use the

³⁸² cf. the present chapter, section A, subsection c, part i.

³⁸³ cf. the present chapter, section A, subsection c, parts ii, iii and iv.

³⁸⁴ cf. Stannard, J. and Capper, D. (2014). *Termination for Breach of Contract*. 1st ed. Oxford: Oxford University Press, at 39.

³⁸⁵ cf. Chitty, *op. cit.*, para 26-039.

compensation for completion of the performance or for remedying its defects would be irrelevant.³⁸⁶ The contents of these additional interests is examined separately in the following subsection³⁸⁷ of the present chapter.

The question of the subordination between the interest in completion of defective or partial performance and the interest in receiving the difference of the value between promised and actually delivered performance might be more complex than appears from the current law. It is usually thought that the promisee is not entitled to the cost for completion of the performance if this would be wholly disproportionate to any resulting benefit.³⁸⁸ However, this understanding is based on *Ruxley*, where the promisee achieved his contractual aim despite the defective performance. It seems that there is no authority for cases where this does not happen – where the defective or partial performance does not lead to satisfaction of the promisee’s contractual interest. In these circumstances there are two options. The contractual aim might be achievable only if a new performance is commenced. This would be the case when the partial or defective performance has no use to the promisee at all. Then his interest will be equal to the market value of a substitutive performance. If the partial or incomplete performance has some value to the promisee, then his interest will be met by the cost of completion of the defective or partial performance, if this cost is lower than the promisee’s interest in substitutive contractual performance. In this case no principles of reasonableness ought to be applied, as the promisee’s interest should always include an opportunity for achievement of his contractual aim.

The satisfaction of any of these three interests would lead to achievement of the promisee’s contractual aim. This would prevent him from suffering any further non-pecuniary harms. Thus, the promisee may commission a painting of his favourite landscape. In case of complete non-performance, he has an interest in receiving the market price that could be charged by an artist of identical popularity, craftsmanship and talent for completion of a similar painting. As a result, the promisee would be able to fulfil his contractual aim and to have his interest achieved. If there is a defective performance, his interest would be to receive compensation that would allow him to have the performance completed. In this case there are a few options. Firstly, if the price for the completion of the partial painting is higher than the market price of a new painting, then the promisee’s interest would be to receive the market price of a substitutive performance. Secondly, if the price for completion of the unfinished painting is less than the market price of a substitute performance, then the promisee’s interest would be equal to the amount that is needed for completion of the performance. In these cases, the promisee should not be refused the lower of these two amounts on the basis of its unreasonableness, as the non-pecuniary aim he pursues is not commensurable to any pecuniary assessments or valuations. If the opposite solution is taken, then the court would be abnegating the promisee’s interest in achieving his contractual aim due to the perceived relative insignificance of that interest. This would undermine the basic principles of freedom of contract and its binding force.

(v) Fulfilment of the promisee’s interest when the achievement of the contractual aim is no longer possible

³⁸⁶ cf. Rowan, Solène, 2019. The ‘Legitimate Interest in Performance’ In the Law on Penalties, *The Cambridge Law Journal*. Cambridge University Press, 78(1), pp. 148–174. The opposite opinion in Chitty, *op. cit.*, para 26-039.

³⁸⁷ cf. the present chapter, section A, subsection c, parts ii, iii and iv.

³⁸⁸ cf. Chitty, *op. cit.*, para 26-039 *et. seq.*

If the promisee's aims cannot be achieved after the breach, his contractual interest will reflect this. He will no longer be interested in receiving the stipulated subject matter as, even if its performance is still possible, he will not be able to use its beneficial qualities or properties as he had intended. In *Hobbs* the promisee and his family would not be interested in a later railway service that the other party might schedule to run the next day. Such late performance would not allow them to achieve their contractual aim – to be able to walk to their house at a particular hour and on a specific day. In *Jarvis* the promisee had only one winter holiday during that year which he wanted to spend in a particular fashion. When this did not happen, nothing could have been done to reverse the time and to provide him an alternative service that could lead to achievement of his contractual aim. In *Watts* the promisees wanted to select a house which would not require substantial renovation so that they could spend their leisure time there. The breach led to an undesirable choice of property, but a reversal of the purchase was no longer possible, even if the survey had been corrected. The case of *Farley* was identical – the promisee's desire to buy a particular property so that he could enjoy a tranquil and serene life far from the disturbances of the town was not achievable reasonably as he had already made an unsuitable purchase.

Despite the promisee's inability to achieve the aims he pursues, his contractual interest does not perish as a result of the breach. The law cannot remain indifferent to situations where the innocent party will be deprived of the contractual benefit due to the promisor's non-performance. If the promisee cannot achieve his contractual aim, he can receive compensation for the harms that he suffers. This substitutive contractual interest is commensurable with the harm inflicted as a result of the promisee's inability to achieve his contractual aim and is not related to any other element of the contractual relationship.³⁸⁹ This interest is the central component of the remedial system that exists in relation to non-pecuniary losses. In these cases, the satisfaction of the substitutive contractual interest would not lead to achievement of the aim pursued by the promisee. However, this interest is the only feasible solution that could be conceived. The other alternative is that the law does not provide any relief at all and leaves the promisee with nothing despite the binding force of the agreement.

In *Hobbs* the promisee and his family were left at a distant railway station, from where they had to undertake a long and unpleasant walk to their final destination. The harm caused to them resulted from their inability to achieve their contractual aims and could not be undone. In *Jarvis* the promisee was unable to spend his annual holiday as desired due to the non-performance. Such an unfortunate outcome is irreversible. However, an alternative interest of the promisee should be recognised and he ought to be entitled to receive a payment which can substitute the unattained contractual aims. This would allow him to achieve alternative non-pecuniary aims that could counterbalance the harms inflicted as a result of the breach. The contents of this interest are explored in the following subsection of this section,³⁹⁰ though its monetary assessment is outside of the scope of the present work.³⁹¹ In all circumstances, regardless of the promisee's ability to achieve his contractual aim as a result of the non-performance, he will have an additional interest in being compensated for the time in which his aim was not achieved as stipulated. This interest is also examined in the following subsection.³⁹²

³⁸⁹ cf. the present subsection, part *ii*.

³⁹⁰ cf. the present section A, subsection c, part *i*.

³⁹¹ cf. Zlatev, Z., 2020. Quantification of damages for non-pecuniary losses (*forthcoming*).

³⁹² cf. the present section A, subsection c, part *v*.

Conclusion to subsection b

The promisee's interest after the breach becomes more complex and nuanced. Its content depends on a number of factors. He may achieve his contractual aim despite the breach. Then he would have no interest in receiving the stipulated subject matter. More often, the breach will deprive him of his contractual aim. In this case, the harm he suffers is consequent on the non-attainment of his aim rather than simply on account of the lack of the stipulated subject matter. The transformative effect of the breach provides for additional forms of relief which guarantee that the binding force of the agreement continues its effect despite the other party's non-performance. The contents of these forms are determined by the promisee's initial interest – to accomplish his contractual aim. If, following breach, this is no longer possible, he is entitled to receive substitutive compensation, which aims to make good the harms deriving from the impossibility of achieving of his aims. If, despite the breach, fulfilment of these aims is still possible, then the promisee has an interest in receiving the covenanted subject matter as agreed or compensation so he may acquire a substitutive one. If the promisor has delivered incomplete or defective performance, then the other party's interest entitles him to the lower value of these two alternatives: the market price for completion of the performance or the market price for a substitutive performance. Additionally, in all cases, the promisee has an interest in compensation for the time in which he could not enjoy his contractual aim.

There are certain misconceptions about the nature and outcome of the transformative effects of breach which the present subsection aims to address. Its main contribution to contract theory is that it justifies the importance of the contractual aim with regard to the nature of the harms suffered by the promisee. Previous authors have tried to establish a direct connection between the covenanted subject matter and the harm that the promisee suffers when the contract is not performed. The present subsection argues that the promisee's interest is satisfied when his contractual aims are achieved. This understanding explains better why in some rare cases like *Ruxley* the promisee will suffer no harms despite the partial or defective performance. The present subsection also outlines, in a more systematic and coherent manner, the existence of the promisee's additional interests that the law acknowledges and their relationship with the contractual aim. A further goal that the present subsection pursues is to create a more comprehensive and intelligible understanding of these additional interests. They are explored with respect to their ability to lead to the achievement of the promisee's contractual aim. In contrast to the orthodox scholarship where some of these interests are subordinated to the principle of reasonableness, the present subsection argues that this requirement should not be taken into consideration, provided that damages lead to achievement of the promisee's contractual aim.

(c) Content of non-pecuniary contractual interest after breach

Introduction to subsection c

The previous subsection explores the relationships between the additional interests that the promisee has after breach and the general purposes that the law aims to achieve with their introduction. The present subsection continues this analysis with an examination of the contents of these interests. Its main research task is to explain why the promisee

might wish to receive something other than the contractual performance as agreed initially. The existing scholarship identifies some of these additional interests too. Nevertheless, it differs from their accounts in the present section in a few important aspects. It has already been noted that the subordination between these interests³⁹³ and the conditions for their existence³⁹⁴ are different to those described previously by other authors or in the case law. Furthermore, the content of these interests and their relationship with the promisee's aim is explored from a new perspective. It seeks to provide a novel understanding of the nature of non-pecuniary harm and the possible ways in which it could be made good so that the promisee is able to achieve his non-pecuniary contractual aim or, if this is impossible, to receive a substitutive payment that is proportionate to the loss incurred because of the breach.

The present subsection contains six parts. They all explore the conceivable ways in which each different interest identified in the previous subsection can or cannot lead to achievement of the promisee's contractual aim. The analysis starts with his interest in receiving compensation for the purposes of acquiring a substitutive subject matter which will lead to attainment of the initial contractual aim. The second part studies the interest in attaining the contractual aim through modes other than the delivery of the contractual subject matter. The third examines the promisee's interest in receiving the difference between the market value of the promised and actually delivered subject matter. It will be argued that, in these cases, he cannot achieve his contractual interest at all. The next part of this subsection describes the interest in the completion of partial or defective performance. It studies the different opportunities that can lead to replacement or repair of the subject matter of the agreement. The fourth part looks at the promisee's interest in compensation when his contractual aim is not achievable in any other ways. In such cases this would be a substitutive interest in the payment of a certain amount of money that is supposed to obliterate the non-pecuniary harms caused by the non-fulfilment of the contractual aim. Finally, the last part analyses the promisee's interest in receiving compensation for the time in which he was not able to enjoy his contractual aim.

(i) Interest in compensation for a substitutive subject matter

In some agreements the promisee is interested in receiving the stipulated subject matter no later than a specific time. In many cases this will be the time when the performance is due. Nevertheless, there are numerous instances where the achievement of the contractual aim is possible at a later moment. Thus, the promisee might commission a painting of his family. This contract might have a due date but even after it has passed, so long as no further changes to the factual circumstances occur, his interest will not cease to exist. Despite the promisor's unwillingness to paint the portrait, the other party still has interest in having the contract performed. In *Hobbs* the promisee and his family would have still wanted to be transported to their destination rather than being left at Esher. If the railway company had provided a later service to Hampton Court Station, this would have led to achievement of the promisee's aim as initially envisaged by him. As a result of this later performance, he would have his contractual interest satisfied, albeit with a certain delay.³⁹⁵ It is a question of fact if later performance would lead to fulfilment of the promisee's contractual aim.

³⁹³ *cf.* the present section, subsection *b*, part *iv*.

³⁹⁴ *cf.* the present section, subsection *b*, part *v*.

³⁹⁵ *cf.* about the consequence of delay: the present subsection, part *vi*.

If it does, he remains interested in having the contractual subject matter rendered as initially agreed. In cases when the other party does not do that voluntarily, or if the promisee's action for specific performance cannot be upheld,³⁹⁶ then his interest is to receive monetary compensation which he can use to acquire a substitutive subject matter from a third party. This interest is not identical in terms of its value with the counter-performance that the promisor is due if the contract is synallagmatic. As has been explored previously,³⁹⁷ the consideration that the promisee provides to the other party does not necessarily reflect the actual price of the contractual object. But when an alternative performance is sought, the promisee would normally have to revert to the market. In such cases the general rules for assessment of the market price of the subject matter should be applied.³⁹⁸

If the example with the portrait is explored further, it could be observed that, where the promisor does not wish to perform, the other party might still prefer to find a substitutive performance.³⁹⁹ The promisee's non-pecuniary interest in having the portrait completed would be attained if he is able to commission this work by another artist of similar popularity, skills and talent. In such cases the price due under the original contract would be entirely irrelevant. The promisee would need an amount that allows him to engage an alternative portraitist. This would depend on the market at the time when the substitutive contract is formed. In *Hobbs* the promisee was left at Esher from where he had no other transportation to his house. However, we can imagine that there were other railway companies offering late night services from Esher to Hampton Court. In this case the promisee's interest would have been equal to the price of the trip between these two stations. It could be also supposed that if there had been a stagecoach between these two suburban towns, his interest would encompass the price of the ticket for such a journey. It is irrelevant what the price in the initial contract was.

(ii) Interest in attainment of the contractual aim through other means

It has been observed that the promisee is not interested in the covenanted subject matter in and of itself. He concludes the agreement in view of the beneficial outcomes that he will obtain as a result of its performance.⁴⁰⁰ Thus, in case of breach, he may be interested in receiving an entirely different benefit if this could nonetheless lead to attainment of his contractual aims. This interest exists in all cases when the achievement of the contractual aim is still possible despite the breach. This hypothesis includes the instances where the promisee is unable to find a substitutive subject matter, and the other party will not provide the promised result even though it is possible to do so.⁴⁰¹ *Hobbs* is a good example of these circumstances. The promisee wanted to be able to spend the night in his house, and that was still possible even when he was left at the wrong station in Surrey. The promisor railway company could have arranged for performance of the agreement if they wished to do so. This was not done and the promisee was unable to find alternative transportation to take him and his family to their final destination. There are numerous other instances which could illustrate circumstances in which other means can lead to fulfilment of the promisee's aim. He might buy an opera ticket for the

³⁹⁶ *cf.* Chitty, *op. cit.*, para 27-011 *et. seq.*

³⁹⁷ *cf.* chapter 2, section C, subsection a, part i.

³⁹⁸ Peel, E., *op. cit.*, para 20-048 – 20-054.

³⁹⁹ For cases where no substitutive performance is available, *cf.* the present subsection, part v.

⁴⁰⁰ *cf.* chapter 2, section A, subsection c, part iii.

⁴⁰¹ For other cases, *cf.* Treitel, *Frustration and Force Majeure*, *op. cit.*, para 7-006 *et. seq.*

Magic Flute, but the performance is cancelled. Then he could decide to attend Swan Lake in another ballet venue. Then his aim – to spend a pleasurable night with some popular classical music and artistic performance – could still be achieved.

In *Hobbs* the trial judge made a very interesting observation about the contractual interest in attainment of one of the aims of the agreement through other means. He noted that the promisee and his family were forced to walk to their home as there was no appropriate overnight accommodation in Esher. If this was not so and they could find a place to spend the night in, their contractual interest with respect to this aim would comprise the amount they would need to arrange for their lodging. There would usually be many alternative ways in which the contractual aim could be achieved. Some would exceed the value of the consideration that the promisee provided significantly. This might require rules that restrict his choice of alternative arrangements for satisfying his contractual interest. This issue has not been explored by the courts before. It could be assumed that in such instances the principles which are used for the assessment of the promisee's pecuniary interest should be applied here too. English law contains general rules that aim to determine the appropriate measure of compensation for defective performance. They are applied to cases where a choice between the cost for completion of the partial performance and the difference between the actual price of the defective and the promised performance has to be made.

In such instances the principle of reasonableness is applied.⁴⁰² In *Ruxley* it is stated that "it would be unreasonable for the plaintiff to insist on reinstatement, as where, for example, the expense of the work involved would be out of all proportion to the benefit to be obtained".⁴⁰³ The principle of reasonableness establishes a relationship between the expense that the promisor needs to incur for completion of the defective or partial performance and the beneficial outcome that would result from this. In instances where the contractual aim is achieved through other means, this principle would establish a correlation between the value of the alternative benefit that would be provided instead of the promised subject matter and the advantageous outcomes that would follow from the attainment of the contractual aim. The rule should be that there must be an inverse proportion between the value of the alternative performance and the achievement of the contractual aim which would follow from it. Thus, the promisee should choose the cheapest benefit that is able to satisfy his contractual interest. His choice should be made between all alternatives that exist at the time when his interest is assessed, but the value of his counter performance should be irrelevant.

The principle of reasonableness should require that the choice between these alternative benefits is made with respect to the aim that they seek to attain. As noted previously,⁴⁰⁴ they are not related to the value of the promised contractual performance, or to the consideration provided by the promisee. Thus, in *Hobbs* the value of the alternative accommodation would not be assessed by its relation to the price of the railway ticket from Wimbledon to Hampton Court. If the promisee had been able to choose between alternative opportunities for lodging, he should be allowed to select the one which would provide sleeping conditions that were closer to those in his house and of which he was deprived as a result of the breach. In the example where the promisee is unable to attend the Magic Flute, he cannot be expected to attend a cinema which is much cheaper, and this would be rather incommensurable with his contractual

⁴⁰² cf. Peel. E., *op. cit.*, para 20-046.

⁴⁰³ [1996] A.C. 344, as per Lord Lloyd of Berwick, at 369.

⁴⁰⁴ cf. chapter 2, section C, subsection c, part ii.

aims. In all circumstances this assessment is a question of fact, but its determination is never related to the contractual price. The principle of reasonableness requires that there is an adequate correlation between the value of the alternative benefit and the aim that is achieved with its provision.

(iii) Interest in the difference in the value between the promised and actually delivered subject matter

It has been argued that the distinctive feature of contractual relationships where non-pecuniary harm could be caused is their specific aim to provide something other than an enhancement of the promisee's patrimonial wealth.⁴⁰⁵ His interest is not in the market value of the performance as he wishes to obtain it for its other qualities or properties. In cases of partial or incomplete performance it has been claimed that the promisee has two alternative interests. The first, which is examined in the following subsection, is to have the contract performed as initially stipulated. The other is to receive the difference in the value between the promised and actually delivered performance.⁴⁰⁶ This second interest can be identified in cases of partial or defective performance which does not lead to achievement of the promisee's contractual aims.⁴⁰⁷ In *Hobbs* there was such a defective performance. The promisee and his family were transported to the wrong station which did not allow them to attain their contractual aim of being able to walk to their house. In the example where a family portrait is commissioned, the artist might leave the painting unfinished and the promisee would be unable to enjoy it as he had initially planned.

In the legal literature⁴⁰⁸ and in the case law⁴⁰⁹ it is usually argued that in all of these circumstances the contractual interest is equal to the difference in the value between the performance in its promised and delivered forms. However, it is rather contentious if this difference can satisfy the promisee's interest. In *Hobbs* the difference between a ticket to Esher or Hampton Court would have been close to nil. The incomplete painting might also have significant value but the promisee would have not achieved his contractual aim and, if was given the difference in value, this would not lead to satisfaction of his non-pecuniary contractual interest. In many agreements for services the promisee has a non-pecuniary interest, and, in case of breach, if he receives some amount of money instead of performance, this will do nothing to advance his contractual aim. In some instances, he will not be able to resell the covenanted subject matter to any third party or, even if he manages to do that, he might not be able to conclude a substitutive agreement that leads to fulfilment of his aim.

The general predilection with which the courts accept the existence of this interest is due to their outdated understanding that the only contractual aim is the realisation of financial profit. As submitted previously, not all contracts are concluded with this aim. When the promisee aims to achieve something other than an enhancement of his financial position, the interest for receiving the difference in the value between the promised and actually delivered subject matter would not exist at all. As has been mentioned,⁴¹⁰ the additional criterion for reasonableness, which it is thought must be taken into

⁴⁰⁵ cf. chapter 2, section A, subsection c, part iv.

⁴⁰⁶ cf. Peel. E., *op. cit.*, para 20-039.

⁴⁰⁷ For the cases where the breach in any of its forms leads to achievement of the promisee's aims, cf. the present section, subsection b, part i.

⁴⁰⁸ cf. Peel. E., *op. cit.*, para 20-039.

⁴⁰⁹ *Keeley v Guy McDonald* (1984) 134 NLJ 522.

⁴¹⁰ cf. the present section, subsection b, part iv.

consideration in determining if this interest exists, should not apply to cases where the promisee has not had his contractual interest satisfied. The leading case which introduces the principle of reasonableness were decided in very different circumstances than those where the partial or defective performance does not lead to attainment of the promisee's aim. English contract law should be able to recognise and uphold the promisee's interest in cases where he does not aim to increase his patrimonial wealth but pursues other goals. In such instances the value of the defective performance should not matter at all as it was not important to him. It has already been argued⁴¹¹ that his contractual interest is not related to the financial valuation of performance, or any other elements of the agreement. It is congruent only with the non-pecuniary aim that he follows.

(iv) Interest in completion of defective or partial performance

There is another interest that the promisee has in cases of partial or defective performance. Its existence is subject to two specific conditions – that it is possible to complete the performance and that the completed performance can lead to attainment of the contractual aim despite the delay. Sometimes partial or defective performance will not result in fulfilment of the promisee's non-pecuniary contractual aim. It has been remarked that an unfinished family portrait or transportation to the wrong station will not satisfy the promisee's aims to enjoy an artistic depiction of his relatives or to be able to spend the night in the comfort of his home. Nevertheless, in many cases there may be ways in which such unsatisfactory performance might be repaired or completed. Thus, the painting could be finished as initially agreed. Transport to Hampton Court station could still have been possible later that night when the promisee and his family had arrived in Esher. In both cases the completion of the performance would have resulted in satisfaction of the promisees' contractual interest as it existed at the time the agreement was formed. In the first case the promisee would be able to enjoy the artistic qualities of the portrait and to preserve his fond memories of his relatives depicted in it. In *Hobbs* the promisee and his family would have been able to spend the night in the comfort of their house.

These instances express the general principle studied earlier⁴¹² – when the promisee receives the subject matter of the agreement, and this leads to achievement of his aim, his contractual interest is fulfilled. This interest is very close to the one examined at the beginning of this subsection – in compensation which enables the acquisition of a substitutive subject matter. In both cases the promisee wishes to receive what was initially stipulated. In contrast to the cases where the subject matter of the agreement was not provided at all, in this instance the law takes into consideration that the promisor has commenced performance and that the most appropriate way in which the other party's contractual interest could be fulfilled is if this partial performance is completed. Similarly to occasions where the promisee wants to obtain a substitutive subject matter, this could be accomplished through two possible modes. The promisor or any third party might complete the unfinished performance voluntarily or a claim for specific performance could be upheld. Alternatively, if this does not happen, the promisee has an interest in receiving the sum it would take to complete the performance. In all cases, this interest exists only if the cost of completing the defective or partial performance is lower than the sum needed to obtain a substitutive subject matter.

⁴¹¹ cf. chapter 2, section C, subsection *a*.

⁴¹² cf. chapter 2, section C, subsection *b*, part *iv*.

(v) Interest in compensation for non-achievement of the contractual aim

In many agreements the promisee is not able to achieve his contractual aim after a certain time. If this happens as a result of breach, it is entirely immaterial that the promisor can provide the stipulated subject matter. The other party is not interested in such a delayed performance, since this would not lead to fulfilment of his contractual aim. In *Hobbs* it would not suffice for the promisor to offer a conveyance to the promised station on the next day or at any later moment. The other party wanted to reach Hampton Court station at a specific time in view of their particular contractual aims. Similarly, in *Jarvis* the travel agency could not have arranged for an alternative holiday at another time. The promisee already spent his annual holiday and a spring or summer vacation elsewhere could not, it might be supposed, substitute for the covenanted winter trip to the Alps. In *Watts and Farley*, a corrected survey containing the necessary findings about the properties would have also been useless after unsuitable houses had been bought. In all of these cases there was a certain moment, which is never earlier than the time of performance, after whose passing the promisee has no contractual interest in a late conferral of the stipulated subject matter.

As a result of the non-performance, the promisee may suffer certain harms.⁴¹³ These are caused by his inability to satisfy his contractual aims. The response that the law provides to these cases is the establishment of additional interests that arise after breach. They address the harms which are caused by the non-performance in different ways. All other interests described in the present subsection thus far lead to attainment of the contractual aim. The losses which the promisee suffers are alleviated in an efficient and comprehensive manner that is very close to the way in which his interest would have been satisfied had there been no breach. Such an outcome is not possible in the cases discussed in the present part of this subsection. Time can never be reversed and the opportunity for satisfaction of the contractual interest as it existed at some earlier moment cannot be restored. Therefore, a different response to the harms caused in these circumstances is needed. It must provide compensation for the impossibility of fulfilment of the original contractual aim. Instead of leading to achievement of the promisee's aim, it substitutes it with something different.

The existence of this interest might seem contentious for it does not fulfil the promisee's interest as it existed at the time of the inception of the agreement. As established previously,⁴¹⁴ the contractual interest that the promisee has before the breach is singular – the achievement of his aim as a result of the delivery of the stipulated subject matter of the agreement. In the cases studied in this part, this outcome is impossible. The particular state of affairs in which the promisee is placed after non-performance does not allow for achievement of his aim. The interests that have been established in the preceding subsection⁴¹⁵ and described in the present subsection are the most suitable response that the law can provide in each of these groups of cases. In those explored thus far, the most appropriate way in which the law can tackle these harms is to eliminate their basis – the non-fulfilment of the contractual aim. As this cannot happen in the cases studied in the present part, there must be an alternative way to address the harms inflicted on the promisee. Instead of extirpating the conditions that instigate the harms, the law offers a monetary replacement for the non-fulfilment of the promisee's aim.

⁴¹³ cf. the present section, subsection b, part ii.

⁴¹⁴ cf. chapter 2, section C, subsection b, part iv.

⁴¹⁵ cf. the present section, subsection b, parts iv and v.

The contents of this substitution cannot be anything other than a payment obligation. It might be thought that the initial contractual aim could be exchanged for some other non-pecuniary benefit which would provide an equally valuable outcome to the promisee. It was seen that this might be possible in the cases examined in the preceding parts of the present subsection, where the contractual performance was replaceable with a completely different subject matter which leads to achievement of the promisee's aim. This approach will not, however be effective in cases where the contractual aim cannot be achieved. It cannot provide an alternative outcome that can possibly be a suitable fulfilment of the aim which the promisee pursues at contract formation. If such a substitution is accepted, it would allow for a complete replacement of the promisee's contractual interest by an allegedly beneficial result to which he did not agree and would perhaps never have aspired. Thus, instead of trying to identify an alternative contractual interest, the law tackles the harms that flow from the breach by establishing a pecuniary remedy for their compensation. In *Farley* the promisee was unable to enjoy the silence and serenity of the Sussex countryside. These harms could not have been made good simply by looking for some alternative contractual aim.

In *Jarvis* a pleasurable winter holiday in the Alps could not be replaced by a future vacation, even if it provided the same amenities which prompted the promisee to conclude the contract. This would not have made up for his dissatisfaction and bitterness flowing from the missed opportunity to spend the desired holiday at a particular time of his life. In such cases the only appropriate interest that the promisee has is in receiving a monetary payment in lieu of the harms caused by the non-performance. The law is unable to provide anything more than this. It cannot impose an alternative contractual aim with presumably similar beneficial outcome. Instead, it leaves that to the promisee who should then have sufficient financial sources to procure this on his own. A basic principle of English contract law is that the parties are the best judges of their own interests and the law should not try to impose substantive rules in their private relationships.⁴¹⁶ In cases where the promisee's contractual aim is no longer achievable, his pecuniary interest in substitutive compensation for the harms he suffers following the breach provides a wide number of opportunities for arrangement of alternative contractual relationships which could lead to achievement of other non-pecuniary aims.⁴¹⁷

(vi) Interest in compensation for delay

If the contract is not performed at the agreed time, the promisee is denied access to the beneficial properties of its subject matter. Thus, his interest will remain unfulfilled. This will last for a certain period of time commencing at the moment when the contractual result should have been provided and ending at the time when any one of the promisee's interests which have been identified thus far is satisfied. The interest in compensation for delay exists in any case of contractual breach and it ought to be added to all of the alternative interests that have been described in the preceding parts of this subsection. On the first place, it might be imagined that a substitutive subject matter was provided in *Hobbs*. A third party might have offered a late-night stagecoach between Esher and Hampton Court. This would have led to achievement of the promisee's interest with a certain delay. The promisee and his family would have been deprived of

⁴¹⁶ *cf. e.g., Chitty, op. cit.*, para 13-041.

⁴¹⁷ For more details about the quantification of the damages awarded in such instances, *cf. Zlatev, Z.*, 2020. Quantification of damages for non-pecuniary losses (*forthcoming*).

the comfort of their home for a period of time beginning at the moment in which they were supposed to arrive in their home had the contract been performed as promised and the actual time in which they would have arrived if a stagecoach was to be found. The promisee would have a distinctive non-pecuniary interest in compensation for the harms that he and his family suffered during this period of time, alongside his other contractual interest, which in this instance consisted in the identification of a substitute performance that led to fulfilment of his aim.

Secondly, there is no difference in cases where the promisee's interest in attainment of the contractual aim is satisfied through other means at a later time. In such cases he has an additional interest in compensation for the harms that he suffers between the times when the performance was due and the time when he finally attains his contractual aim via alternative methods. In *Hobbs* it was suggested that the promisee might have achieved his contractual aim if a suitable overnight accommodation existed in Esher. If this was so, there may yet have been a period of time it would have taken to arrange this lodging and, as a result, the promisee and his family would have spent an additional amount of time being deprived of the comfort of their home. This would not have happened if they were transported to Hampton Court Station as initially agreed. They would have had an additional interest in compensation for the harms suffered as a consequence of this delay. Thirdly, similar additional interests exist in cases of a defective or partial performance. Their rationale is similar to the previous examples. Fourthly, such an interest can be identified even when the promisee is entitled to compensation for the harms that are suffered through non-achievement of his contractual aim.

The nature of the interest in compensation for delay is very close to the interest explored in the preceding part of this subsection. It aims to address the harms inflicted as a result of the promisee's being deprived of the contractual aim for a certain period of time. There is no way they can be eliminated. Time cannot be reversed and, once the delay occurs, the promisee will remain divested of the covenanted contractual result until one of the interests explored in the previous parts of this subsection is attained. Therefore, the only difference between the interests in compensation for delay and the interest arising from non-achievement of the contractual aim is with respect to the time of their effects. In cases when provision of the covenanted subject matter is delayed, the promisee is deprived of his entitlement to enjoy the benefit of the performance for a limited period of time until the subject matter is provided. In cases when the achievement of the contractual aim is no longer possible, he is deprived of the possibility of achieving his non-pecuniary aim everlastingly. This temporal difference between these two interests does not amend their inherent likeness. They both consist of the promisee's entitlement to monetary compensation aimed at counterbalancing the harms resulting from his inability to enjoy the benefits of the stipulated performance.

Conclusion to subsection c

More broadly, the purposes of all of the other interests exhibited in the present subsection are similar. They all aim to address the harms that the promisee suffers in case of breach. The differences between them are consequent on the divergent nature of the harms⁴¹⁸ and the necessity of a specific approach to each case. If achievement of the promisee's aims is possible after breach, his interest is to have the contract performed by the promisor or some other third party,

⁴¹⁸ *cf.* the present section, subsection *b*, parts *ii*.

provided that the nature of the contractual subject matter allows for this. Alternatively, the promisee will be interested in receiving a payment which allows him to acquire an identical subject matter from elsewhere. If the promisee is interested in achieving his contractual aim after the breach but he cannot arrange for a substitutive subject matter, his interest can be achieved by other means. They should be chosen with reference to the principle of reasonableness – there should be an adequate correlation between their cost and the beneficial effect that they would provide with respect to achievement of the contractual interest. In cases of partial or defective performance, the promisee has an interest in its completion or repair, if this would lead to attainment of his aim, and if its value is lower than the amount that would be needed for a new substitutive subject matter. The completion of the partial performance or repair of the defective performance could be done by the promisor or a third party or, alternatively, the promisee might receive compensation equal to the cost of securing someone to do this. If his aim cannot be achieved after breach, the promisee would wish to receive a certain amount of money instead of his inability to have his contractual interest satisfied otherwise. Lastly, in all of the above cases the promisee has an interest in compensation for the period of time in which he is unable to enjoy the aim that he pursues with the agreement.

The transformation of the contractual interest from its initial content as examined in the previous chapter⁴¹⁹ to its various forms following breach has not been described in the legal literature. Most authors identify this interest solely as a measure of the compensation that the promisee is entitled to receive and do not provide any account on its content or other functions. The approach of this subsection is reversed. The analysis of the contractual interest has been explored more systematically, from the moment of its inception at the time of contract formation to the time of its transformation after the breach. On this understanding, the contractual interest is not simply a concept that is relevant only to the assessment of the compensation. It establishes a connection between the content of the contract, the promisee's aim and the feasibility of fulfilment of the contractual aim despite the breach. This approach provides an opportunity for a more plausible explanation of the instances where the interest is satisfied even if the subject matter of the agreement is not provided at all. Yet, the most important contribution of the present subsection to legal scholarship is the discovery of the relationship between the contractual subject matter and the contractual interest. Their correlation defines all consequences of the breach and is employed further in the succeeding section of the present chapter to define the losses that are caused if the promisee's interest is not fulfilled.

Conclusion to section A

The present section aims to describe the changes in the contractual obligation following the non-delivery of the promised subject matter. The typical understanding, seen in both the legal literature and the case law, is that it is the breach which significantly determines the nature and the content of the harms caused to the promisee. In the present section, this view is rejected. It is established that the promisee's inability to fulfil the aim that he pursues is the only factor that defines the consequences of the breach. The breach only initiates certain changes to the promisee's interest and the promisor's obligation but without being able to define their nature or content. The contractual interest – described in the preceding chapter as consisting of the subject matter and the aim of the agreement – is the only factor which can determine the

⁴¹⁹ *cf.* chapter 2, section C.

type and the scope of losses that are inflicted. The promisee cannot suffer any harms which are not linked to the aim that he pursues with the contract. His losses result from the impossibility of achieving his aim. Their contents and nature cannot be influenced by the factual circumstances pertaining to breach other than in light of this aim. Thus, the changes in the contractual relationship that follow the non-performance reflect the necessity of fulfilment of the promisee's aim and are not related to any other state of affairs in which the contractual relationship might be placed as a result of the breach.

The promisee's interest could be satisfied through a number of different routes. Sometimes achievement of the contractual aim that he pursues with the performance is still possible despite the breach. If so, his interest is in such compensation as enables him to acquire a substitutive subject matter whose rendering will lead to achievement of his aim in the same way as had the contract been duly performed. If the promisor is not willing to provide the stipulated subject matter and the other party is not able to arrange its delivery through other means, the promisee's interest will include compensation for attainment of the contractual aim through other means. If a defective or incomplete performance is rendered, and the promisee's aim is still achievable despite that, he will be interested in completion of this performance to the standard covenanted in the contract. In all of these cases the promisee will be able to attain his aim despite the breach but he will be interested in an additional compensation for the delayed fulfilment of his non-pecuniary interest. In other instances, the promisee's contractual aim will not be achievable after breach. In these cases, he has an interest in receiving a monetary compensation for this. This will enable him to pursue other interests that could substitute the one which would have not been satisfied with the agreement.

No previous author has identified the transformative effects of breach with respect to the promisee's non-pecuniary contractual interest. Existing accounts typically reflect on the adaptability or flexibility of the contractual interest in addressing the harms the promisee suffers. The achievement of the promisee's aim remains the main element of his contractual interest even after breach. Non-performance will not generally put an end to his aspiration to attain his contractual aim. This then implicates some further forms of contractual interest which emerge after breach. All aim to provide the most adequate response to the losses deriving from non-performance. The purpose of these remedies is to lead either to achievement of the contractual aim or to provide for its most suitable substitution. Then, despite the adverse consequences following the non-performance, the promisee could be placed in a position which would be as close as possible to the one he would have occupied had the contract been performed.

This would mean that the promisee will either achieve his aim through other routes than the agreed performance or he will receive appropriate compensation instead. These are the only conceivable ways in which his contractual interest could be satisfied after breach. These two alternatives do not necessarily suppose a delivery of the stipulated subject matter of the agreement. This is because the contractual interest, as examined in this thesis, has a more complex nature than has been described by other authors. This is one of the contributions that the present work aims to make to the existing legal scholarship. The dynamic and adjustable essence of the promisee's interest supposes a more comprehensive and nuanced approach to its different forms during the lifetime of the contractual obligation. Furthermore, the approach adopted in the present thesis assumes that the contractual interest should not be seen as a mere measure of the losses that follow from non-performance. It is the response that the law provides to the harms

caused to the promisee. These harms, in turn, depend on the contents of the promisee's contractual interest at the moment of contract formation. The breach or any other facts which might occur after this time cannot change the substance of the promisee's interest. They merely lead to its transformation which endeavours to ensure two alternative outcomes – achievement of his aim or providing an appropriate pecuniary substitution instead.

B. Non-pecuniary losses

Introduction to section B

There is a close correlation between the promisee's non-pecuniary contractual interest and the losses incurred as a result of the breach. His inability to accomplish the aims pursued with the agreement determines the extent and contents of the harms that he suffers. This dependency should be considered to be evident.⁴²⁰ It has been submitted that the promisee would have no direct interest in the mere rendering of the stipulated subject matter. If this is so, then it ought to be assumed that the fact of non-performance cannot in itself entail any losses – the promisee cannot be hurt by the lack of something whose availability would not have benefitted him in the first place. This conclusion is not true of the aims that he pursues. These are the reasons for which he concludes the agreement and whose non-fulfilment deprives him of something of particular value to him. The origin of non-pecuniary losses should be defined with regard to the promisee's inability to attain his non-pecuniary contractual aims. The purpose of the present section is to examine this topic in detail. It explores the precise mechanism by which these harms are inflicted and looks further into the intricacies of the relationship between the contractual interest, whose content after the non-performance has already been identified,⁴²¹ and the losses suffered as a consequence of the breach.

The performance interest has been perceived traditionally⁴²² as a measure of damages. The approach that the present thesis adopts is different. The notion of the non-pecuniary contractual interest examined here⁴²³ is very different to the old understanding⁴²⁴ of the performance or expectation interest. Furthermore, the aim of this section is to provide a new concept of non-pecuniary losses rather than assessment of the amount of compensation that is due in cases of breach. It therefore describes these harms without reference to their eventual indemnification. The existing scholarship does not examine independently the nature of non-pecuniary losses. Perhaps all authors who have explored this question presuppose that it does not need specific study because it is clear intuitively or its answer is not needed when the only concern of the courts is the assessment of the damages that are due for compensation of these losses. The present subsection demonstrates that neither of these assumptions is correct. The predominant understanding of the scope of non-pecuniary harms is too narrow and is not based on any scholarly grounds. Additionally, it is not feasible to provide a meaningful assessment of the amount that purports to compensate certain harms if there is no clarity about their nature, extent and particular characteristics.

⁴²⁰ *cf. e.g.* Burrows, A., *op. cit.*, at 32 *et. seq.*

⁴²¹ *cf.* the present chapter, section A, subsection c.

⁴²² *cf.* Peel, E., *op. cit.*, para 20-020 *et. seq.*

⁴²³ *cf.* chapter 2, section C.

⁴²⁴ *cf.* Chitty, *op. cit.*, para 26-024.

The present section aims to address these gaps in the legal literature. It explores the nature of non-pecuniary losses as it may be established by reference to the relationship between the subject matter of the agreement and the aims that the promisee pursues with its delivery. Although this correlation has already been examined in detail,⁴²⁵ the present analysis describes the effects of the changes to the contractual interest instigated by the breach and the consequences to which they lead. Thus, the new concept of non-pecuniary losses is associated with their origin. Even so this does not exhaust the scholarly goals that this section pursues. Its main research question concerns the quiddity of non-pecuniary losses deriving from breach of contract. The analysis identifies all distinctive features of these harms and the exact route which leads to their causation. It establishes a better explanation of their injurious effect and a more detailed description of their connection both with the subject matter of the agreement and with the contractual aims pursued by the promisee.

This section consists of three subsections. The first one describes the essence of non-pecuniary losses. It claims that their only distinctive feature is that they are a consequence of the promisee's inability to achieve his non-pecuniary contractual aims. This conclusion is supported by a detailed analysis of the relationship between the contractual subject matter, the promisee's aims and the non-performance. The second subsection explores other features of non-pecuniary losses, which derive from their consequential nature. It is submitted that the adverse effect of these harms, their various instantiations and the external boundaries of their scope are determined entirely by the promisee's non-pecuniary contractual interest and do not depend on any factual circumstances beyond those that led to formation of the contract. The last subsection concerns the classification of non-pecuniary losses. Although there might be different principles on which such categorisations might be made, the perspective that is adopted in the present analysis is closely determined by its main research question – the identification of the nature of losses. Thus, their most distinctive principle is taken as a basis from which their classification is approached.

(a) Nature of non-pecuniary losses

Introduction to subsection a

It has been established that non-pecuniary losses are caused in a certain type of contractual relationship.⁴²⁶ The goals of the present subsection are to explore the precise mechanisms by which these harms are inflicted. The preceding section⁴²⁷ contains a description of the various forms of the promisee's interest after non-performance. It examines them with respect to their ability to result either in achievement of the promisee's aim or in the payment of a suitable compensation. The present subsection continues this analysis by exploring the process in which his interest is harmed when his non-pecuniary aim is not attained. Although there are various ways in which these harms could be remedied, the goals of this section are not to examine the manner in which the promisee can be indemnified. Rather it takes a step backwards and looks into the nature of these losses. The analysis addresses an existing gap in the legal literature, where no detailed description of the essence of non-pecuniary losses exists. It explores the process by which these harms are

⁴²⁵ *cf.* chapter 2, section B, subsection b, part i.

⁴²⁶ *cf.* the present chapter, section A, subsection c.

⁴²⁷ *cf.* the present chapter, section A, subsection b.

inflicted. This examination is based on the findings about the nature and content of the non-pecuniary interest established in the preceding parts of this thesis. The main research task of the present subsection is to identify the contractual setting in which non-pecuniary losses are caused. In particular, it examines the way in which the elements of the contractual relationship determine the nature of the losses.

This subsection has four parts. They examine the manner in which non-pecuniary losses are caused and their interaction with the other elements of the contractual relationship. The first part investigates the circumstances in which these harms are inflicted. It argues that they are the result of a causal chain of events which commences with non-performance of the agreement and finishes with infliction of loss. The next two parts explore this causal relationship in more detail by examining the links between its three elements separately. The second part is about the relationship between breach and non-achievement of the contractual aim. Its objective is to demonstrate that the content of the contractual subject matter does not itself determine what harms may result from breach and that their correlation is different to the one described in the legal literature. The penultimate part of this subsection addresses the relationship between non-achievement of the promisee's aim and the non-pecuniary losses that he suffers. The purpose of this part is to demonstrate that the aim determines not only the type but also the content and scope of the losses caused as a result of its unfulfillment. The last part proposes a new broader definition of non-pecuniary losses based on the findings established in the previous parts of this subsection.

(i) Non-fulfilment of non-pecuniary contractual aim

The nature of the losses suffered by the promisee is determined by his inability to achieve the contractual aim that he pursues with the agreement. It has already been argued⁴²⁸ that the distinctive feature of the relationships where non-pecuniary harms could be caused is the essence of this aim and that, apart from this criterion, there are no other factors that can result in infliction of such losses. The purpose of the present part of this subsection is to explore the way in which the non-fulfilment of the aim leads to infliction of non-pecuniary losses. The analysis establishes a connection between the origin and the content of the harms suffered by the promisee as a result of the breach. He concludes the agreement in order to achieve a certain non-pecuniary aim. If, as a consequence of breach, this does not happen, he is deprived of that benefit. Nonetheless, the nature of this deprivation is more closely related to his contractual aim than to the subject matter of the agreement. The outcome of the non-performance is determined by the deprivation encountered as a result of the non-achievement of the promisee's contractual aim and is its most natural consequence. The non-pecuniary losses are a deficiency or lack of a certain result that would have been achieved had the contract been performed as covenanted.

In *Hobbs* the losses suffered by the promisee are described as "the inconvenience to the plaintiffs in having to walk..."⁴²⁹ too long. This account follows the causal course of events resulting from the breach. The promisee and his family were left at the wrong railway station, from which they had no option but to walk to their final destination. The aim of the agreement was their transportation to Hampton Court railway station from where they would have been able to walk to their house in New Hampton. The losses they suffered as a result of the breach were described as a consequence of non-

⁴²⁸ *cf.* the present chapter, section A, subsection b.

⁴²⁹ *Per* Blackburn, J., *op. cit.*, at 120.

fulfilment of the aim pursued with the agreement. There are no other references in the judgments to alternative way of designating the outcome of the non-performance. All four judges speak about the inconvenience that the promisee and his family experienced when they were forced to undertake the longer and more uncomfortable walk to their house during that cold and drizzling night. In this case the harms are an inevitable and necessary consequence of the non-achievement of the promisee's aim.

The most suitable initial description of losses is that they are resulting from the want of the non-pecuniary aim pursued by the promisee. In *Jarvis* the promisee's aims were to have a gratifying and enjoyable winter holiday in the Swiss Alps. This was not performed as stipulated and the losses that were inflicted included "the disappointment, the distress, the upset and frustration"⁴³⁰ resulting from the unfortunate state of affairs in which the promisee was placed as a result of the breach. These were the anticipated outcomes that would follow from non-performance of a contract whose aims were to provide a pleasurable vacation. The relationship between the non-fulfilment of the aims of the agreement and the content of the losses is causal. The harms suffered by the promisee are the outcome that results from non-achievement of these aims. Wherever the promisee is deprived of delightful and pleasing moments that would follow from the contractual performance, he will suffer dissatisfaction, vexation and infuriation if that performance is not forthcoming. As a consequence of the breach, the usual course of events, described in the previous chapter⁴³¹ as leading from the performance of the agreement to achievement of the aim pursued by the promisee, will take a different course.

In cases of breach, the contractual aim that would otherwise be attained as a consequence of the performance will not be fulfilled. An alternative causal chain of events will follow, and its final outcome will be the infliction of losses. In the usual course of things, the performance would lead to achievement of the aim pursued by the promisee. In case of breach, a different result will occur. When the covenanted performance is not provided, the aim that the promisee pursues is unlikely to be achieved. The non-fulfilment of this aim causes the losses. In *Watts* the survey that was the subject matter of the agreement was needed for the identification and subsequent purchase of a property with specific features. The promisor failed to provide the necessary information and, thus, prevented the promisees from selecting a house fit for their purposes. Their aim was to purchase a property that was in good general condition and which did not need substantial renovation. The breach meant the promisees needed to undertake extensive modernisation of the property. This non-fulfilment of the contractual aim defined the nature of the losses that were suffered – distress and inconvenience resulting from the construction works that had to be undertaken.

A similar causal relationship between the non-fulfilment of the contractual aim and the losses inflicted as its result can be seen in *Farley* too. The promisee wanted to purchase a large residence where he planned to enjoy the tranquillity of the Sussex countryside. The breach deprived him of this opportunity. Two feasible chains of events could be identified here. The first concerns the hypothesis of full and exact performance. It has two consecutive elements, which are related causally – delivery of the stipulated subject matter of the agreement and achievement of the aim pursued by the promisee. Their relationship has already been described previously.⁴³² The other alternative factual setting consists of

⁴³⁰ *Per* Lord Denning M.R., *op. cit.*, at 238.

⁴³¹ *cf.* chapter 2, section B, subsection b, part i.

⁴³² *cf.* chapter 2, section B, subsection b, part ii.

three successive events which are also linked causally – breach, unfulfilment of the contractual aim and non-pecuniary losses. The promisor did not explore the level of aircraft noise despite his explicit duty to do so. This breach led to the other party's inability to choose a suitable house for a tranquil and serene retreat, which was the aim that he pursued with the agreement. At the end, the non-fulfilment of this aim led to his diminished enjoyment of the property.⁴³³

(ii) Relationship between contractual subject matter and non-fulfilment of contractual aim

The first element of the causal chain of events that leads to infliction of non-pecuniary losses is the relationship between the breach of the agreement and the non-fulfilment of the aim pursued by the promisee. It has been argued⁴³⁴ that the non-performance constitutes failure on the part of the promisor to deliver the contractual subject matter. Typically, this leads to the other party's inability to attain the aim for which he concludes the agreement, and which ultimately expresses his interest in the performance. This relationship constitutes the initial component that results in non-pecuniary harms to the promisee. It resembles the correlation between performance and achievement of the contractual aim as examined earlier.⁴³⁵ Nevertheless, its separate exploration is important not only because of the complete lack of other detailed studies in English legal theory of the causation that leads to infliction of harms. The purpose of the present account is to establish a more comprehensive understanding of the contents of these losses. Such an understanding is not possible if the outcome of the breach is not explored within the setting of the contractual interest, as it has been defined in the preceding chapter.⁴³⁶ This approach also provides a further justification of the conclusions reached in the present chapter⁴³⁷ concerning the inability of any external facts occurring after contract formation to determine the nature or the extent of these losses.

In the usual course of things, the breach will result in non-fulfilment of the contractual aim. In *Hobbs* the promisee and his family were transported to the wrong railway station which meant they could not achieve his aim of getting to their house with only a short walk. The relationship between these two incidents is causal. The promisee's preference was to reach a certain destination in a particular fashion. The manner in which he wanted to attain his contractual aim predetermined the outcome of the breach. He and his family were not conveyed to the preferred station, and thus, they were unable to reach their house within a relatively brief walk. The causation is factual and is based on the promisee's selected way of achieving his contractual aim. The relationship between the breach of the contract and the non-fulfilment of the contractual aim reflects the promisee's design of their causal connection. His inability to reach his house after a short stroll from his covenanted destination is due to his personal preference to walk only a certain distance during the night. He concludes the contract in view of the factual relationship between his conveyance to Hampton Court station and his and his companions' desire or ability to walk onwards to their home.

⁴³³ *Per* Lord Steyn, *op. cit.*, at 742.

⁴³⁴ *cf.* the present chapter, section A, subsection a, part v.

⁴³⁵ *cf.* chapter 2, section B, subsection b, part i.

⁴³⁶ *cf.* chapter 2, section C.

⁴³⁷ *cf.* the present chapter, section A, subsection a, part iii.

Similar causality can be observed in *Jarvis* too. The subject matter of the agreement consisted in the provision of a winter holiday abroad with explicitly covenanted specific features. Had the contract been performed, the promisee's aim of a pleasurable winter holiday would likely have been attained. In the usual course of things, the amenities that were stipulated in the agreement would have provided an enjoyable vacation. Instead, the performance was incomplete, and this led to the promisee's inability to spend his annual leave in the way he had planned. This does not mean that the causality between the lack of the promised contractual subject matter and the resulting non-attainment of the promisee's aims is subjective. Their connection does not depend on a unilateral assessment of the fulfilment of the aim by one of the parties. The absence of the subject matter can be expected to lead to non-fulfilment of the promisee's aim in the ordinary course of things. *Jarvis* illustrates this position better than other cases. It might be expected that the level of satisfaction from a holiday will be highly subjective and will depend significantly on the personal preferences and the promisee's lifestyle. Despite this, the circumstances of the case supposed that the non-achievement of his aim was an inevitable and foreseeable outcome of the non-performance.

This conclusion can be explained by the special relationship that exists between the contractual subject matter and the aim pursued by the promisee. In the same way in which contractual performance ordinarily leads to achievement of his aim, the breach has the opposite effect. In *Watts* the promisor failed to identify the need for further refurbishments of the property that was subject to the survey and this resulted in the other parties' choosing a house that needed large modernisations or did not otherwise meet their expectations. This outcome was the result that followed directly from the breach. In the usual case, the contractual aim will be achievable as an immediate result of the delivery of the subject matter and conversely, non-performance will lead to an evident non-attainment of this aim. This factual dependency is due to the properties and the qualities of the subject matter, which were chosen by the promisee in view of their ability to fulfil his contractual aim. Consequently, if they are not provided, the promisee's chosen means to his desired outcome is defeated. If there is no survey that established the facts in which the promisees in *Watts* were interested, then they were thereby impeded in the achievement of their contractual aims.

There are some rare instances in which the causality between the subject matter and the aim of the agreement can take different forms. Thus, despite the non-delivery of the stipulated contractual benefit, the promisee's aim might yet be attained through other ways. *Ruxley* represents a suitable example of such cases. Even with the defective performance the promisee was still able to dive safely in the swimming pool. This was due to the fact that the initial causal dependency between the subject matter and the aim did not exist. These rare exceptions to the general principle have already been examined in the preceding chapter.⁴³⁸ They concern the instances where the causality explored between the subject matter and the aim of the agreement did not exist initially or ceased to exist between the time of the contractual formation and the time of its non-performance. In *Ruxley* a deeper pool than the one which was actually built would have always been able to lead to fulfilment of the non-pecuniary aim pursued by the promisee. Nevertheless, these cases support the general principle advanced in the present work, concerning the necessity of a causal relationship between non-performance of the contract and non-fulfilment of the promisee's aim. If the link between these two incidents does not exist, then no losses will be incurred.

⁴³⁸ cf. chapter 2, section C, subsection b, part iii.

Thus, the shallower pool did not result in the promisee's inability to dive safely and consequently he suffered no losses as a result of this defective performance. Further examples could illustrate this position. In *Chandler v Webster*⁴³⁹ and in other similar cases⁴⁴⁰ rooms providing views over Pall Mall were rented. The promisee's aim was to observe the procession following the new king's coronation, but the festivities were cancelled. In all of these cases even if the promisor had not performed, this would not have resulted in unfulfilment of the other parties' aims and thus no losses would have been inflicted. This can be explained by the lack of the causal relationship between the promisors' failure to provide the rooms and the promisees' inability to watch the procession. An identical outcome would follow in *Hobbs* if the bridge between the railway station and the promisee's house had been closed. Then it would not be on account of the promisor's breach, in taking them to Esher, that they were unable to walk to their final destination. Instead this would have been impossible for other reasons unrelated to the breach. This supports the rule established in this part of the present subsection: that a requisite condition for breach leading to the infliction of losses is the existence of a causal connection between that breach and the non-fulfilment of the promisee's aim.

(iii) Relationship between non-fulfilment of contractual aim and non-pecuniary losses

The second element of the causal chain of events that leads to infliction of non-pecuniary losses is the relationship between the non-fulfilment of the aim pursued by the promisee and the losses that are caused to him. It has been argued that there is no direct correlation between the lack of the covenanted subject matter and the loss to the promisee. The fulfilment of the promisee's aim is the intermediate element between these two incidents. It represents the manner in which the performance of the agreement was to be used by the promisee. In cases of breach it is the defining element of the harms that would be incurred. It has been argued that the promisee is not interested in obtaining the subject matter *per se*. He will always want to acquire it for some of its beneficial qualities or properties.⁴⁴¹ In the structure of the contractual relationship, these have been identified as his aims.⁴⁴² Thus, in cases of breach, the promisee suffers loss not simply because of the absence of the stipulated subject matter but due to his inability to use its beneficial features in light of his particular purposes. In other words, he suffers losses because of his inability to attain his contractual aims.

In *Hobbs* the promisee and his family were deprived of the possibility of reaching their house within a short walk from Hampton Court Station. They suffered non-pecuniary loss as a result of their inability to reach their house as aimed. There is no direct connection between the subject matter of the agreement and the nature of these harms. The contract was for railway transportation of the promisee, his spouse and their two children between two stations. It did not contain any covenant that the promisee and his companions will not suffer inconvenience and discomfort from having to embark on a long walk during the night nor were there any references to other undertakings in the contractual terms apart from the conveyance. Despite this, the losses that were inflicted consisted of certain non-pecuniary harms described in the

⁴³⁹ [1904] 1 K.B. 493.

⁴⁴⁰ cf. Treitel, *Frustration and Force Majeure*, *op. cit.*, para 15-051.

⁴⁴¹ cf. chapter 2, section A, subsection c, part iii.

⁴⁴² cf. chapter 2, section B, subsection b, part i.

judgement.⁴⁴³ They were direct and necessary consequences of the promisee's inability to attain his contractual aims. Thus, the relationship between contractual non-performance and the content of the losses is indirect. It could be explained only if the aim is taken into consideration.

One of the reasons for the difficulties that English legal theory encounters when explaining the scope of non-pecuniary losses may be related to the lack of inquiry into their relationship with the non-fulfilment of the contractual aim. This problem is reproduced in the case law which struggles to provide a suitable justification for the more extensive recoverability of damages for non-pecuniary losses. The courts seem to be unable to establish a direct connection between the contractual subject matter and the content of these losses. Even in *Jarvis* the harms that the promisee suffered were defined by the county court as "the difference between the price paid and the value of the holiday in fact furnished, "taking into account the plaintiff's feelings of annoyance and frustration."⁴⁴⁴ Although this perception was criticised by the Court of Appeal, it is symptomatic of the general perception of the nature of these losses as evident even today. The difficulties in explaining the essence of these losses follow not only from the outdated understanding that they must have some tangible or physical existence,⁴⁴⁵ but are also due to the unwitting unwillingness of judges to confirm that there does not need to be any direct correspondence between the content of the contractual subject matter and the losses.

The importance of the relationship between the non-fulfilment of the contractual aim and the resulting non-pecuniary losses can be seen in *Watts* too. The promisees were not interested in obtaining the survey in and of itself. Their intentions were to be able to determine whether the property they wanted to buy needed substantial renovations. This aim was not fulfilled. The promisees could not establish the true condition of the country house. As a result, they were induced to purchase the property not knowing that major refurbishments were required. Upon discovery of this fact, the necessary construction works were undertaken. This led to significant disruption of the promisees' plans for the use of their house. They suffered "distress, worry, vexation and inconvenience".⁴⁴⁶ All these forms of non-pecuniary losses followed as a result of the promisees' inability to attain their contractual aim. It was neither an inevitable consequence of the contractual breach nor it was associated in any other manner with the subject matter of the breached agreement. The only plausible way in which the harms that were incurred in this case can be explained is on their correlation with the promisee's contractual aim. The failure of the contractual law theory to identify the cases where non-pecuniary losses are inflicted could be one of the reasons for the initial reluctance in awarding damages in contracts where no tangible or physical manifestation of the non-pecuniary losses was discernible.⁴⁴⁷

There are cases where breach might not lead to non-fulfilment of the aim pursued by the promisee.⁴⁴⁸ All the same, the opposite correlation does not exist. If he cannot achieve his aim, he always suffers non-pecuniary losses. This might be explained on the role of the aim in the agreement. The subject matter is the way in which the promisee has chosen to

⁴⁴³ *Hobbs*, *op. cit.*, at 111.

⁴⁴⁴ *Per* Edmund Davies L.J., *op. cit.*, at 239.

⁴⁴⁵ *Ibid*, at 240.

⁴⁴⁶ *Watts*, *op. cit.*, at 1427.

⁴⁴⁷ *cf. e.g. Bailey v Bullock* [1950] 2 All E.R. 1167.

⁴⁴⁸ *cf.* the present subsection, part *iii*.

achieve his aim, but there are alternative ways that could lead to this result too. Thus, in some agreements the outcome of performance might be achieved from another source⁴⁴⁹ or a partial or incomplete performance might cause no harms at all.⁴⁵⁰ The position with the aim is different. It cannot be substituted with anything else, as the aim is what the promisee wants to achieve as a result of the contractual performance. He would not be interested in something else because the aim is the outcome that motivates him to enter into the contract. If this aim is not attained, it leads to a certain deficit, shortage or insufficiency of something that he would otherwise have obtained. This causes the loss that he suffers.

In *Farley* there might have been other ways in which the promisee could have been able to identify the most suitable property to purchase. If he could find out whether the house was affected by aircraft noise by other means, then his contractual aim would have been achieved and he would not have suffered non-pecuniary losses as a result of the breach. Nevertheless, where this information was not obtained through an alternative source, and the promisee decided to buy the Riverside House based on the findings of the survey, he was exposed to intolerably high levels of noise. This caused him physical inconvenience, discomfort and mental distress unavoidably. There are no feasible situations in which a choice of an unsuitable house will not cause such losses. This outcome is a necessary result of the non-fulfilment of the contractual aim, in the same way as the achievement of the aim is an indispensable consequence of the delivery of the covenanted subject matter. The infliction of losses is a natural outcome of the usual course of things and its causality is not related to a correlation which is rooted in the contract itself. This is why, even if the aim pursued by the promisee might be agreed with the other party, this agreement is not the source of the causal correlation between the aim and the losses. In all cases there is no normative but only a factual dependency between the aim and the harms. The promisee in *Farley* would suffer physical inconvenience, discomfort and mental distress in any identical circumstances in which he was exposed to high level of noises, regardless of the lack of any covenants with the other party stipulating relief from such harms or addressing the content of the promisee's losses otherwise.

(iv) Definition of non-pecuniary losses

There is no notion of non-pecuniary losses that can be considered to be widely accepted either in the academic literature or in the case law. Thus, some of the leading texts⁴⁵¹ do not introduce a general concept of this type of losses at all. Instead, they merely explore the question of recoverability of damages for some particular instantiations of non-pecuniary harms like inconvenience, mental distress or loss of reputation. The brevity of these texts and their preoccupation with the issues of compensation do not allow for an assumption that a certain definition of this type of losses is derivable from their analyses. Others⁴⁵² introduce the notion of non-pecuniary losses as a distinctive type of harms. Nevertheless, they do not offer a general definition of such losses. Their approach is similar to the one adopted in other works where the questions of compensation are explored. This does not provide an opportunity for a decisive conclusion about the distinctive features of these harms. Even substantial treatises on damages⁴⁵³ do not offer a

⁴⁴⁹ cf. chapter 2, section C, subsection b, part ii.

⁴⁵⁰ cf. chapter 2, section C, subsection b, part iii.

⁴⁵¹ cf. Anson, *op. cit.*, at 566-570.

⁴⁵² cf. Peel, E., *op. cit.*, para 20-083 and Chitty, *op. cit.*, para 26-151.

⁴⁵³ cf. McGregor, *op. cit.*, para 5-015.

description of the general notion of non-pecuniary losses or of their particular characteristics. This may be due to the practical orientation of these works, where purely theoretic conceptualisations could appear otiose.

Other authors who explore non-pecuniary losses in greater detail⁴⁵⁴ assume that their distinctive feature is that they do not lead to “subtraction from the promisee's net wealth”. A similar view is that there are certain types of harms which do not affect the patrimonial wealth of the promisee.⁴⁵⁵ This is the most popular view of the nature of these losses.⁴⁵⁶ While this feature would certainly apply to all non-pecuniary losses, it might be questioned if there are other types of harms which do not lead to financial impoverishment on the part of the promisee as a result of the breach. In the preceding chapter of this work⁴⁵⁷ it was submitted that, in commercial contracts where pure services are provided, breach would not lead to non-pecuniary losses despite the lack of impoverishment as a direct result of the non-performance. This would be so, as neither the performance nor the non-performance would affect directly the financial position of the promisee. A further example that might illustrate this situation is when the promisee would not benefit from the performance at all. This could be in cases when the contract is in favour of third parties, and also when the promisee uses the services that are due to be provided in his further commercial undertakings. The non-delivery of a business report will not impoverish him, but it will not inflict any non-pecuniary losses either. In other words, there is no third type of loss: it is either pecuniary or non-pecuniary.

A better way to define the specific features of non-pecuniary losses would be to derive their definition from the structural analysis of the contractual relationship as studied in the preceding parts of the present subsection. This approach illustrates the precise origin of the losses and the mechanism by which they are inflicted. This perspective differs significantly from the manner in which other authors define these harms – by reference to the lack of a financial impact of non-performance. The non-pecuniary losses are the consequences of non-fulfilment of the non-pecuniary aim pursued by the promisee in cases of breach. Although such a definition might appear to be too technical and not very intuitive, it provides a comprehensive and exhaustive description of all non-pecuniary losses. All alternative concepts proposed by other authors collapse, as they are unable to identify the distinctive characteristics which define the quiddity of these harms. By contrast, the notion proposed here is able to incorporate all instances where the losses inflicted as an outcome of the breach are of non-pecuniary essence. Furthermore, there are no other cases where non-pecuniary harms could be suffered.

Conclusion to subsection a

A closer look into the contractual relationship demonstrates that there is no obvious correlation between the nature of the contractual subject matter and the contents of the losses suffered in the event of breach. Thus, if the promisee is due to receive a report about certain features of a property that he wishes to buy, he may suffer non-pecuniary losses. They might result from the inconvenience of having to undertake substantial renovation works or from the distress and

⁴⁵⁴ Rowan, Solène, *op. cit.*, at 121.

⁴⁵⁵ *cf.* Webb, Charlie, 2017. Performance Damages, *op. cit.*, at 211 *et. seq.*

⁴⁵⁶ See too McKendrick, E and K. Worthington, *op. cit.*, at 303.

⁴⁵⁷ *cf.* chapter 2, section A, subsection b, part v.

vexation caused by excessive levels of noise. In these cases, there is no direct connection between the stipulated subject matter and the harms that are caused when it is not rendered as promised – identical subject matters may inflict different harms. There is a relationship between the subject matter and the losses suffered by the promisee, but it is more complex than previously observed. In the first place, the non-performance of the agreement must lead to non-fulfilment of the promisee's aim. This dependency is observed in most cases of breach. Secondly, the non-fulfilment of the promisee's aim leads to infliction of certain losses, whose nature and extent is determined solely by the aim. This causal relationship can be discovered in all cases where the contractual aim is not achieved. These findings can be used to develop a new concept of non-pecuniary losses. They can be defined as all adverse consequences resulting from non-fulfilment of the non-pecuniary aims pursued by the promisee in cases of breach of contract.

The main contributions of the present subsection to private legal theory are two. Firstly, it identifies the correlation between the nature of the contractual subject matter and the contents of the resulting losses. No previous accounts have examined the precise mechanism by which harms resulting from non-performance are inflicted or what the causes which define their contents are. Previous work has not explored how the contractual subject matter can determine the scope of losses suffered as a result of breach. It has only been suggested that there is some form of causal relationship between the stipulated performance and the harms, without detailed examination of the specific components or nature of this relationship. The present subsection argues that the breach leads to the promisee's inability to achieve his contractual aim, which in turn causes him losses. Secondly, the present analysis proposes a new definition of non-pecuniary losses. No previous authors have attempted to provide such a short description of this type of harms. Nevertheless, the merits of this definition are not limited to its simplicity and brevity. The main feature of non-pecuniary losses is their being a result of the non-fulfilment of the non-pecuniary contractual aim. It is argued further that all their characteristics follow necessarily from this. The task of the following subsection is to explore this question in more detail.

(b) Characteristics of non-pecuniary losses

Introduction to subsection b

Non-pecuniary losses have been described as consisting in the adverse consequences of the lack of achievement of the non-pecuniary aim pursued by the promisee in cases of breach. This subsection explores the essential characteristics of non-pecuniary losses which follow from this definition. There has been no attempt in the scholarship to examine the particular features which define the nature of these harms and that differentiate them from other consequences of non-performance. The present subsection aims to fill this gap. Its main research task will be to explore the distinctive feature of non-pecuniary losses as identified in the definition suggested in the previous subsection⁴⁵⁸ – their consequential nature. In addition to that, it will explain why no other characteristics of these losses are needed for their definition, despite the existence of some additional features that are identified in the present analysis. They are also explored in detail here. The purpose of this subsection is to represent the nature of these harms in a more general and neutral manner, establishing their common features encountered in all instantiations that non-pecuniary losses can take. The

⁴⁵⁸ *cf.* the present section, subsection a, part iv.

analysis aims to demonstrate further that the definition which has been proposed includes all types of non-pecuniary losses and that beyond its scope remain harms of pecuniary nature only.

This subsection has four parts. The first examines the consequential nature of non-pecuniary losses. Its aim is to provide an account of these losses, perceived only as an outcome of non-fulfilment of the promisee's contractual aim. The next subsection examines a secondary feature of these losses which can be derived from their consequential nature – the adverse manner in which they affect the promisee. The analysis explores the scope of the unfavourable effects of non-pecuniary losses. The third part of the subsection establishes a connection between the general concept of non-pecuniary losses and their numerous instantiations. Its purpose is to demonstrate that the materialisation of these harms can vary greatly. Despite these vast differences between the various forms non-pecuniary losses take, they all display the general characteristics identified in this section. This is true even for some of the rarest forms of non-pecuniary losses or still for those that other authors might consider not to be non-pecuniary at all. The last part continues the study of borderline cases of non-pecuniary losses. Its aim is to examine the external boundaries of the proposed definition by analysing some peculiar types of harms whose non-pecuniary nature might appear uncertain.

(i) Consequential nature of non-pecuniary losses

The distinctive feature of non-pecuniary losses is that they result from the promisee's inability to achieve his non-pecuniary contractual aim. This part of the present subsection aims to examine the principles in which this causation determines the nature of losses. The problem of causation is not alien to English contract law. It is usually studied as a separate method for limiting damages⁴⁵⁹ or with regard to the principle of remoteness of damages which aims to limit the promisor's liability only to foreseeable losses.⁴⁶⁰ The present analysis examines causation more generally in view of the object of this thesis to identify all non-pecuniary harms deriving from contractual breach.⁴⁶¹ This task has been left to the legal scholarship entirely, as the courts are not generally engaged in exploring such principles of causation.⁴⁶² The importance of this issue for the present analysis is related to the view that the only source of losses is the fact of breach.⁴⁶³ Hence all general principles of causation, as examined in the legal literature,⁴⁶⁴ apply to cases where non-pecuniary losses are caused. The only new element that the present work introduces is the requirement that the losses are not entailed by the breach directly but result from the promisee's inability to attain his non-pecuniary contractual aim.⁴⁶⁵

There usually are certain intermediate events which could either interrupt⁴⁶⁶ the causal chain leading to losses or amend⁴⁶⁷ its direction. This gives rise to some general concerns⁴⁶⁸ with regard to the identification of the consequences

⁴⁵⁹ *cf.* Peel, E., *op. cit.*, para 20-094.

⁴⁶⁰ *cf.* Chitty, *op. cit.*, paras 26-117 *et. seq.*

⁴⁶¹ About the restrictions on recoverability of damages for non-pecuniary losses, *cf.* chapter 1, section A, subsection a.

⁴⁶² *cf.* Chitty, *op. cit.*, para 26-066 and *Galoo v Bright Grahame Murray* [1994] 1 W.L.R. 1360, 1374–1375.

⁴⁶³ *cf.* chapter 3, section A, subsection a, part ii.

⁴⁶⁴ McGregor, *op. cit.*, paras 8-140 *et. seq.*

⁴⁶⁵ *cf.* the present section, subsection a, part iii.

⁴⁶⁶ McGregor, *op. cit.*, paras 8-143 *et. seq.*

⁴⁶⁷ Peel, E., *op. cit.*, para 20-098.

⁴⁶⁸ *cf.* Chitty, *op. cit.*, para 26-068.

that are following from non-performance. As has been suggested earlier, these difficulties are addressed better if the consequential nature of these losses is viewed from the perspective of the promisee's inability to achieve his non-pecuniary aim.⁴⁶⁹ This approach allows for a distinction between the losses he suffers and other consequences of the breach which do not cause any injuries to him. By definition the promisee is interested only in attainment of his aim. If the non-performance leads to other outcomes which do not have such an effect, no harms can derive from this. This distinction has not been made in the legal literature where all losses are thought to be consequences of the breach,⁴⁷⁰ but only some, subject to additional limitations,⁴⁷¹ are considered to be recoverable. The perception that losses are consequences only of the non-fulfilment of the promisee's contractual aim is closer to their intrinsic nature, as derived from the leading sources and legal literature. From a practical perspective, this understanding provides a better opportunity to identify and assess the non-pecuniary losses.

The exclusively consequential nature of the harms could be illustrated with an example. There is no information about the particular terms of the contracts in which rooms were hired at Pall Mall in St James's for the sole purpose of observing the procession for the coronation of King Edward VII. Nonetheless, it might be imagined that there were members of the public who engaged rooms in the Carlton Hotel that provided splendid views over the street and was frequently visited by the King. The rooms of the hotel, which was thought to be the most prominent establishment of this type in London, would have offered numerous facilities: for example, a special bed providing a great level of comfort for a soothing night sleep. However, if, in breach of contract, no such bed was provided, the promisee would not have been able to claim he suffered any losses as a result of this. They would have not been a consequence of his non-attainment of the contractual aim, which was simply to observe the procession. There are many other examples where a contract promises certain services which are nonetheless not a part of the promisee's aim. The subsequent non-provision of these services need not prevent him from attainment of his aim and, as a result, no losses will be inflicted. This was the case of *Ruxley*. In other words, a loss will only be sustained if it results from non-attainment of the promisee's contractual interest.⁴⁷²

Conversely, all adverse consequences deriving from his inability to achieve the contractual aim amount to non-pecuniary losses. Whilst contractual performance is a specific result that does not lead directly to any change in the promisee's position, the effects of attainment of the contractual aim as a result of this performance are more significant. They provide a certain benefit, advantage or gain to the promisee. For this reason, the breach itself does not amount to a loss.⁴⁷³ In the same way in which the performance does not change the promisee's position, the breach does not injure him directly. The opposite conclusion can be drawn with regard to the effects of the contractual aim. Its achievement always leads to a certain alteration of the promisee's position as perceived at the time of contractual formation. Its non-achievement, on the other hand, has the opposite effect. It deprives him of the advantageous outcome of the accomplishment of the aim pursued with the agreement. Where the aim is non-pecuniary, this always amounts to a certain harm of non-pecuniary nature.

⁴⁶⁹ *cf.* the present section, subsection *a*, part *i*.

⁴⁷⁰ Winterton, D., *op. cit.*, at 107 *et. seq.*

⁴⁷¹ *cf.* Chitty, *op. cit.*, para 26-117.

⁴⁷² See another example in Peel, E., *op. cit.*, para 20-039.

⁴⁷³ An identical conclusion but with alternative argumentation in Peel, E., *op. cit.*, para 20-008 and *Ford v White* [1964] 1 W.L.R. 885.

A further example can illustrate this correlation. In *Farley* the delivery of the agreed subject matter would not have led to an alteration of the promisee's position as an immediate result. A survey that explores the levels of aircraft noise affecting particular property does not in itself provide any specific benefit to him. Nevertheless, the findings were to be used for a particular purpose: to enable him to select a suitable country house. This amounts to a beneficial outcome that was pursued at the time of contract formation. Accordingly, the breach *per se* did not result in any harms. The wrong conclusion that the property was not affected by aircraft noise did not cause non-pecuniary losses. They were inflicted by the breach only instrumentally, as it led to the non-achievement of the promisee's aim of being able to find a suitable property. The injurious alteration of his position was instigated as a result of his inability to purchase the desired house, which was a consequence of his lack of knowledge that the house was affected by aircraft noise.

(ii) Adverse effects of non-pecuniary losses

Non-pecuniary losses are all consequences that follow from the promisee's inability to achieve his non-pecuniary contractual aim. His inability to use the beneficial qualities or properties of the covenanted subject matter constitutes a harm by depriving him of something that he was entitled to obtain from the contract being performed. The adverse effect of non-pecuniary losses is not a separate feature that exists along with the characteristics identified in the previous subsection.⁴⁷⁴ It is merely their additional trait which follows from their consequential character. If non-pecuniary losses result from the promisee's inability to achieve the aim for which he concludes the agreement, then this inability would by its inherent nature have injurious effects on him always. The unfavourable essence of losses has always been identified in the legal literature,⁴⁷⁵ with loss understood as being a detrimental consequence of the breach⁴⁷⁶ or even a more general infringement of a certain right.⁴⁷⁷ Nevertheless, no other commentators have explained the precise mechanism by which it occurs, its distinction from all other consequences of breach, the origin of its injurious nature, and the manner in which it is related to the elements of the contractual relationship.

The adverse effect of the losses is a result of their being a consequence of the promisee's inability to achieve his contractual aim. All other outcomes following from the breach cannot cause any harms to him as they do not affect his contractual interest. Other commentators⁴⁷⁸ who try to provide a definition of loss are forced to include its harmful nature as a substantive additional element of its essence. That is needed in order to establish a distinction between losses and other consequences of breach of contract which do not necessarily have injurious effects. No such clarification is needed in the context of the present analysis, where the losses are not perceived as direct outcomes of non-performance. They result only from the non-attainment of the aim pursued by the promisee. This perception establishes a more direct correlation between the subject matter of the agreement, the promisee's interest in its performance and the losses that

⁴⁷⁴ *cf.* the present section, subsection *a*, part *iv*.

⁴⁷⁵ Peel, E., *op. cit.*, para 20-005.

⁴⁷⁶ Winterton, D., *op. cit.*, at 108.

⁴⁷⁷ Birks, P., 1995. The Concept of a Civil Wrong. In: D. Owen, (ed.), *The Philosophical Foundations of Tort Law*, 1st ed. Oxford and New York: Oxford University Press, at 40.

⁴⁷⁸ Winterton, D., *op. cit.*, at 108.

are incurred in case of non-performance. The lack of an understanding about this relationship might have led to the erroneous description advanced by other authors who think that all infringements of contractual rights are losses.⁴⁷⁹

The harmful nature of the non-pecuniary losses is not general. They only affect the promisee with regard to his inability to attain the contractual aims that he pursues. In *Hobbs* there were many different outcomes of the breach, not all of which amounted to losses. The promisee and his family did not pass through Thames Ditton railway station, which is an intermediate stop on the branch line to Hampton Court and where all services departing from Wimbledon were scheduled to call. In certain cases that could have caused them losses. Thus, it might have been planned that other people were going to join their company on their midnight trip to Hampton Court Station or a package might have been left at the station for them. As none of these were part of the promisee's contractual aims, this aspect, or consequence, of the breach did not cause him and his family any non-pecuniary harms. The promisee and his family wanted to be able to walk to their house only. All outcomes of their inability to accomplish this result generated their non-pecuniary losses and, consequently, had an adverse nature. As a result of the non-performance, the promisee and his companions had to undertake an extended displeasing walk to their house. The other party objected that this did not necessarily do harm: 'a walk of several miles, so far from being matter of inconvenience, would be just the contrary'.⁴⁸⁰ Precisely because the walk was a consequence of the promisee and his companions' inability to attain their contractual aim, it had injurious effects on them.

The modern legal theory does not provide a suitable principle for identifying cases where the breach has adverse effects on the promisee. In the present work non-pecuniary losses are perceived as consequences of the promisee's inability to achieve his contractual aim. Other commentators suggest that the losses are a direct consequence of the breach. In such a case it could be either accepted that all consequence of the breach are losses or a suitable mechanism for distinction of the losses from the other consequences of the breach should be put in place. Most authors⁴⁸¹ choose the latter alternative. This forces them to add to their definitions the qualification that only the detrimental consequences of the non-performance constitute losses. This proves to be very problematic both with regard to its principal definition and subsequent identification. As seen in *Hobbs*, a few miles walk does not necessarily need to be disagreeable. A similar problem arises in *Ruxley*. It was proven that despite the defective performance, the swimming pool was in fact safe for diving and the promisee's wellbeing could have not been affected under the circumstances in which he had been planning to use it. Furthermore, the question of the subjectivity of the detrimental nature of the losses was put very interestingly in *Farley*. The promisee was an early riser who liked to 'enjoy the delightful gardens, the pool and the other amenities which is made pretty intolerable, he says, and I accept from his point of view between, say, the hours of six o'clock and eight o'clock in the morning which is the time when he would be minded to do this'.⁴⁸²

⁴⁷⁹ McKendrick, Ewan, 2003. The Common Law at Work: The Saga of *Alfred McAlpine Construction Ltd v Panatown Ltd*, Oxford University Commonwealth Law Journal, 3:2, at 167, the opposite opinion in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518 at 534.

⁴⁸⁰ *Hobbs*, *op. cit.*, per Cockburn, C. J., at 116.

⁴⁸¹ Winterton, D., *op. cit.*, at 108.

⁴⁸² *Farley*, *op. cit.*, per Lord Steyn, at 743.

These examples might lead to the suggestion that the detrimental effects of the losses are to be assessed subjectively, taking into consideration the particular preferences that the promisee has in each case. This understanding might not appear to be consistent with the principle of objectivity in agreement⁴⁸³ and more importantly, it does not provide a sufficiently satisfactory answer about the basis of the assessment on which the detrimental effect of the breach is to be identified. A particular factual situation concerning the promisee can be burdensome in some cases but pleasurable in others. If it is accepted that all consequences of the promisee's inability to achieve his contractual aim amount to losses, none of these difficulties exist. There are certain principles of identification of the contractual aim which guarantee that a suitable balance between both parties' interests is achieved.⁴⁸⁴ On the other hand, no random selection of particular consequences of the breach is needed: all aspects of the non-attainment of the contractual aim constitute losses.⁴⁸⁵

(iii) Materialisation of non-pecuniary losses

Non-pecuniary losses are facts, consequential on the promisee's incapability of attaining his contractual aims. They are elements of the objective position in which the promisee is placed as a result of a causal chain of events initiated by the breach. They are part of the setting in which he is to be found and which is caused by his contractual interest not being satisfied. The losses are objective facts which could be any occurrence of an intangible or physical nature. They might be the displeasure felt when a favourite opera performance cannot be attended, the pain suffered in case of a physical injury or the vexation experienced when an important personal occasion is missed. In many instances they will not be definable by a single emotional status or even by a mere combination of sentiments. Non-pecuniary losses are the entire factual situation in which the promisee is placed after the breach and as a consequence of the non-achievement of his aim. His complex position with all its elements as they can be identified by an objective examination of the factual outcome of the breach will represent the non-pecuniary losses he suffers.

There are no general restrictions on the subject matter that the promisor may be obliged to provide. The parties can agree, subject to specific exceptions, that any result of a material or intangible nature may be due. An identical conclusion follows with regard to the promisee's aims that he pursues with the contract. This could be explained by the specific correlation that exists between the subject matter of the agreement and the promisee's aim.⁴⁸⁶ Thus, the losses, which are all outcomes deriving from his inability to attain this aim, will represent a wide variety of facts. In some cases, their description would involve a single term – vexation, fright, anxiety. In others, the promisee's position will be more complex. It will include a more sophisticated condition of mind or other state of affairs which do not need to be associated with his emotional wellbeing. Non-pecuniary losses might be material facts, like the inconvenience of walking during a drizzling night, deprivation of a fond memory when a photographer does not take pictures of wedding celebrations,⁴⁸⁷ the inability to meet a close relative if the transportation to him was not provided. The entire situation in which the promisee is placed as a result of non-attainment of the contractual aim represents his losses. Just as there cannot be a list of all possible

⁴⁸³ Chitty, *op. cit.*, para 2-002.

⁴⁸⁴ *cf.* chapter 2, section B, subsection a.

⁴⁸⁵ *cf.* the present section, subsection a, part iv.

⁴⁸⁶ *cf.* chapter 2, section B, subsection b, part i.

⁴⁸⁷ *Diesen v Samson* 1971 SLT (Sh Ct) 49.

subject matters that could be agreed between the parties, there cannot be a definite list of all facts that could exhaust the feasible non-pecuniary losses which could be inflicted on the promisee.

The promisee's entire factual position at the time of breach would be very complex. It will involve countless circumstances which will be related to his contract in one way or another. The losses are only those of them which result from the non-achievement of his contractual aim. In *Jarvis* the promisee found himself in a position where he was offered a holiday of an inferior quality to the one he was promised. His factual position at the time of the breach included many elements – the room in which he was accommodated, the food he was served, the additional leisure facilities he was offered and so on. It also included the telephone conversations that he might have held with his relatives, the post cards that he might have sent to England or even the books that he may well have read during his stay. His losses were related exclusively to those circumstances which resulted from his inability to have a pleasurable and enjoyable winter holiday – there was no house party at the hotel, no-one was able to speak English or to entertain him, no suitable skiing facilities were provided, and the food was not satisfactory. All of these circumstances amounted to breach and were the source of the promisee's non-pecuniary losses. They placed him in a complex emotional status, one described in the case as "disappointment and distress" but which actually includes the whole array of feelings that the promisee in fact experienced in those unfortunate circumstances.

Non-pecuniary losses are not necessarily new facts. In many circumstances the breach can result in a new emotional status or in an entirely different situation, but this does not need be so. The promisee's inability to attain his aim could also modify existing facts, including his feelings or other factual circumstances which would exist before the breach. In *Farley* the promisee ended up with a new property that, despite his intentions, did not provide a tranquil and peaceful countryside retreat. The breach formed a new factual situation in which he was deprived of pleasure, relaxation and peace of mind. In other cases, the outcome of the promisee's inability to achieve his aim could lead to alteration of facts which existed previously or to no change at all despite that such a change was due. Thus, a contract where the treatment of a patient is not successful may result in his position deteriorating or simply not improving. In such instances the losses will be the pain and suffering that the patient continues to experience despite the contractual arrangement that he would be cured.

Non-pecuniary losses can have countless forms of manifestation, whose comprehensive enumeration is impossible. Despite this, it has been suggested by other commentators⁴⁸⁸ that they can be divided in two groups: harms to the promisee's physical and to his psychological well-being. It is admitted that this does not cover all instances of losses affecting the promisee's non-pecuniary interest. A task which aims to provide a classification of an enormous number of facts is always very difficult and will inevitably fail to incorporate all cases where such harms are inflicted. This classification also makes evident the limited perspective from which non-pecuniary losses are perceived. The present part of this subsection aims to demonstrate that any consequence, regardless of its tangible nature or ability to contribute to the promisee's physical or physiological well-being, can in fact amount to a non-pecuniary loss. Thus, the aesthetic displeasure of failing to attend an opera performance could hardly be defined as pertaining to either of these two types

⁴⁸⁸ Winterton, D., *op. cit.*, at 113.

of losses, but it is not questionable that it causes non-pecuniary harms. Other examples of complex factual situations where various aspects of the promisee's well-being are affected also exclude the feasibility of a comprehensive classification established on the proposed principles. A better view is to reiterate the definition proposed in the previous subsection⁴⁸⁹ which merely points out the consequential nature of these losses without trying to limit or define further the factual scope of their numerous forms of instantiations.

(iv) External boundaries of the scope of non-pecuniary losses

The scope of non-pecuniary losses as defined in the previous subsection⁴⁹⁰ and described in the present one⁴⁹¹ is very wide. They could amount to any fact which derives from the promisee's inability to attain his aim. However, for such harms to be inflicted following a breach of contract, the promisee must have a non-pecuniary interest in its performance. This would mean that the aim which he pursues, and whose non-fulfilment will cause him losses, should be of non-pecuniary nature. This is the case wherever the promisee seeks performance of the contract for any reason other or alongside an enhancement of his patrimonial wealth. If there are certain restrictions to the factual circumstances in which non-pecuniary losses could materialise themselves, the causal origin of these restrictions should be traced. It has been established that the harms are consequences of the non-fulfilment of the promisee's aim,⁴⁹² which is in turn caused by the breach.⁴⁹³ The breach itself is non-delivery of the promised contractual subject matter.⁴⁹⁴ The present subsection examines all of these correlations separately. It looks into their ability to lead to some limitations on the scope of the factual circumstances in which the non-pecuniary losses could materialise.

There are no general restrictions with regard to the nature of the contractual subject matter. Although there might be some limitations in relation to the result that the promisor will be obligated to provide to the promisee,⁴⁹⁵ they do not exclude a particular category of factual circumstance that might pertain to contractual performance. Thus, a contract where the promisor is obligated to commit a crime will not be valid. An agreement where the promisee is due to receive a specific object, which the other party is obliged to obtain through a criminal act, will be one of these examples. This however would not prevent the parties from an alternative arrangement where an identical object will have to be provided via other routes. The fact that the contractual subject matter is always for the delivery of a certain result allows the parties to conclude agreements with a wide variety of subject matters. The initial element of the causal chain which causes non-pecuniary losses to the promisee is not restricted with regard to its constitutive elements. The subject matter might be formed by any factual result that the promisor agrees to provide to the other party.

⁴⁸⁹ *cf.* the present section, subsection *a*, part *iv*.

⁴⁹⁰ *cf.* the present section, subsection *a*, part *iv*.

⁴⁹¹ *cf.* the present subsection, parts *i* – *iii*.

⁴⁹² *cf.* the present section, subsection *a*, part *iii*.

⁴⁹³ *cf.* the present chapter, section *A*, subsection *a*, part *v*.

⁴⁹⁴ *cf.* the present section, subsection *a*, part *ii*.

⁴⁹⁵ *cf. supra* note 151.

It has been seen that the non-fulfilment of the promisee's aim, which is the next element of the causal chain leading to infliction of losses, is a consequence of the breach.⁴⁹⁶ If the stipulated contractual result is not provided, the promisee is not likely to achieve his aim. This relationship does not establish any restrictions with regard to the facts that will amount to this outcome. The aims pursued by the promisee could be very different and the same is true of their non-fulfilment. Their variety is much greater than the subject matter from which they derive, as in many cases a particular subject matter could lead to attainment of many different aims. Thus, a railway journey could give an opportunity to enjoy the picturesque countryside through which the train runs. It can also provide transportation to the promisee's house or to a place where an important even of a personal nature is to be held. A family portrait can afford the promisee a chance for an aesthetic enjoyment of its artistic or historic qualities, but it can also preserve a fond personal memory. Thus, the contractual aim can comprise any facts which the promisee wants to achieve with the delivery of the covenanted subject matter.

The last element of the causal chain that determines the scope of these harms has already been examined in the present subsection.⁴⁹⁷ It has been established that all consequences of the non-fulfilment of the promisee's non-pecuniary aim amount to non-pecuniary losses. If the non-fulfilment of the aim consists of any such factual circumstances, then its outcomes would also exhibit a great deal of variety. It might be objected that in such cases not all outcomes of the non-fulfilment of the contractual aim are losses but only those of them which affect the promisee. This could be a necessary qualification in definitions which do not acknowledge the existence of the contractual aim as an intermediate step in the causal chain of events leading to the infliction of harms. The present work does not endorse this understanding. The contractual aim represents the particular way in which the performance affects the promisee. Its non-fulfilment will always cause him a certain loss. The aim embodies the promisee's intention to use certain properties or qualities of the stipulated subject matter. His inability to do so would cause him harms inevitably as he will be deprived of the opportunity of achieving this outcome.

Not all elements of the factual situation in which the promisee is placed as a result of the breach will be consequences of his inability to achieve his contractual aim. There must be a causal relationship between the subject matter of the agreement and the aim pursued by him. This dependency is factual – the subject matter has a variety of properties and qualities that the promisee aims to use but they are not unlimited. A railway journey can lead to satisfaction of a number of contractual aims. It can take a promisee to a certain destination, but it cannot result in providing some aesthetic pleasure that could be otherwise experienced by attendance at an opera performance. These limitations on the scope of the possible losses are imposed by the requirements of causality. This is always a matter of fact and does not involve any normative restriction. The circumstances of each case will identify the type of losses which can be sustained. The harms will consist of any state of affairs which results from the promisee's inability to attain the contractual aim and, provided that this causal requirement is met, no further limitations would restrict the scope of losses.

Conclusion to subsection b

⁴⁹⁶ *cf.* the present chapter, section A, subsection b, part ii.

⁴⁹⁷ *cf.* the present subsection, part i.

Non-pecuniary losses comprise of all outcomes resulting from the promisee's incapability to achieve his non-pecuniary contractual aim. All features of these harms can be derived from their consequential nature. All factual circumstances in which the promisee is placed as a result of non-fulfilment of his contractual aims amount to non-pecuniary losses. A more general conclusion is also possible – all consequences of the promisee's inability to attain his aims amount to losses and, conversely, there are no other sources from where harms can be inflicted. As a result of their correlation with the non-fulfilment of the promisee's aim, the losses will have an adverse effect on him inexorably. Their injurious nature derives from his inability to use the qualities and properties of the contractual subject matter which were his reasons for entering into the agreement. The origin of the losses determines their forms of materialisation too. There are no specific limitations on the factual circumstances which can amount to non-pecuniary harms. Any state of affairs in which the promisee is placed as a result of the breach will amount to a loss, provided that it is a result of the causal chain of events starting with the breach and ending with the promisee's inability to achieve his aim. Lastly, this complex correlation determines the lack of external boundaries of the scope of non-pecuniary losses. Their only limitations are of a factual nature and are related to the natural boundaries of causation that each particular case will impose.

This subsection has only one scholarly aim – to provide a justification of the definition of non-pecuniary losses proposed previously. The importance of this task is self-evident, not only because of the lack of any other descriptions of this type of harms in English legal literature. The advantages that the new concept of non-pecuniary losses offers are also related to the explanatory might the idea of contractual aim offers. The new approach to the nature of these harms leads to the conclusion that the only important feature of non-pecuniary losses is their being a consequence of the non-fulfilment of a non-pecuniary contractual aim. All their other qualifications are ancillary or supplementary and derive only from the consequential characteristics of such losses. Thus, the contribution of the present subsection to legal scholarship concerns not only the discovery of this new definition but also its ability to provide a complete explanation of the deficiencies of all other attempts for characterisation of the non-pecuniary losses. An incontrovertible proof of the persuasiveness of the proposed new idea is its comprehensive nature. All consequences of the non-fulfilment of the promisee's aims are losses and there are no alternative sources for such harms.

(c) Classification of non-pecuniary losses

Introduction to subsection c

Non-pecuniary losses can take a wide variety of forms. They can affect the promisee's psychological well-being, his health, his aesthetic feelings or might injure his non-pecuniary interests in any other way. Indeed, their instantiations are countless. This prompts a look into the feasibility of their further systematisation. A categorisation of non-pecuniary losses would allow for an advanced and more nuanced examination of their nature. It has been established⁴⁹⁸ that there are no other general features that characterise the essence of non-pecuniary losses. This does not exclude the possibility that a certain group of non-pecuniary harms exhibit specific features distinctive to them. Thus, it might be possible that there is a group of non-pecuniary harms which reveal a closer causal connection to the promisee's inability to achieve his

⁴⁹⁸ *cf.* the present section, subsection *b*, parts *ii-iv*.

contractual aim. This might substantiate further conclusions about the nature of these losses and the mechanism by which they harm the promisee's non-pecuniary contractual interest. A new classification of non-pecuniary losses would also fill an existing gap in the legal literature where no comprehensive suggestions for categorisations exist. The main research question of this subsection is whether classification of non-pecuniary losses is possible. Inquiring into the possibility of such categorisation will in turn facilitate the further examination of the nature of these harms.

This subsection has four parts. The first examines classifications of non-pecuniary losses which have been proposed in the legal literature. It identifies the principles on which these categorisations are based and their suitability for resolving some of the questions which have been raised in the present work. In particular, it is seen how these classifications provide further insights into the general nature of non-pecuniary losses. The second part examines the principles on which categorisations of non-pecuniary losses might be possible. It is submitted that the classification of losses should be based on their main characteristics identified in this chapter – their consequential nature. It is suggested that losses deriving immediately from the promisee's impossibility of attaining his contractual aim should be referred to as primary non-pecuniary losses. They are explored in the third part of this subsection. The losses which are not direct consequences of the promisee's inability to attain his aim are referred to as secondary non-pecuniary losses. They are examined in the last part of the subsection. The third and the fourth parts explore the two categories of non-pecuniary losses separately and aim to demonstrate that the consequential nature of non-pecuniary losses is not only the main feature of these losses but also determines the nature and the intensity of their harmful effects on the promisee's non-pecuniary contractual interest.

(i) Existing classifications

One possible classification of non-pecuniary losses that is proposed in the existing literature⁴⁹⁹ has already been mentioned.⁵⁰⁰ It is based on the manner in which the harms affect the promisee. It is claimed that these losses can injure either his physical or his psychological well-being. Yet, it is not clear what the purposes of this categorisation are. It does not provide an opportunity for a further characterisation of the nature or the particular features of non-pecuniary losses. Nor is it clear what the legal consequences of this classification are. It is also acknowledged that there may be some non-pecuniary losses which can fall into neither of these groups. Thus, it is claimed that damages to reputation are not cases of physical injury, but they do not amount to psychiatric harm either. This conclusion might be disputed. The fact that someone's good name has been tarnished does not lead to any harm automatically in the same way in which the breach of contract does not cause losses on its own.⁵⁰¹ The nature of the harms in these cases depend on what the consequences of the damages to the reputation are. If this causes mental suffering to the promisee, then this would amount to non-pecuniary loss. If it prevents him from conclusion of a profitable contract, it will lead to pecuniary harms.

⁴⁹⁹ Winterton, D., *op. cit.*, at 113.

⁵⁰⁰ *cf.* the present section, subsection *b*, part *iii*.

⁵⁰¹ *cf.* the present chapter, section *A*, subsection *b*, part *i*.

There is one more categorisation⁵⁰² of non-pecuniary losses which has been proposed in the legal literature. It establishes two types of cases where damages can be recovered. In the first the promisee's harms result from the other party's failure to confer a non-pecuniary benefit. These are referred to as positive losses. In the second group of cases the harms are caused by the breach itself. These losses are consequential by nature and can occur in any type of contract regardless of the contents of the covenanted subject matter. Nevertheless, this division does not establish a clear criterion on which cases providing a non-pecuniary advantage to the promisee can be identified. In such instances the nature of the stipulated subject matter cannot be a suitable principle for this distinction.⁵⁰³ But even if it is accepted that there is an appropriate criterion which can do so, there are further hurdles associated with the proposed classification. This is because there is an overlap between the two types of cases where damages for non-pecuniary losses can be claimed. It is acknowledged that such an overlap can occur, and *Hobbs* is given⁵⁰⁴ as an example. The losses that were inflicted there are explained as having a consequential nature. However, in the preceding parts⁵⁰⁵ of this thesis has already been established that the harms inflicted in *Hobbs* do not have such an essence.

It is suggested further that the first group of cases can be divided into further subcategories. The promisor might agree explicitly that he is obliged to confer a non-pecuniary benefit. A contract where a solicitor promises to protect the promisee from molestation is given as an example of this subcategory.⁵⁰⁶ The next subcategory includes cases where a promise to provide a non-pecuniary advantage is implied. It is acknowledged that this group can pose some difficulties related to the general uncertainty with respect to the principle of implication of a term in a contract.⁵⁰⁷ Even so, the troubles with this subcategory do not derive from this obstacle only. This classification aims to identify all contractual subject matters whose non-delivery would cause non-pecuniary losses eventually. It has already been demonstrated⁵⁰⁸ that this task cannot lead to satisfactory results. The only suitable principle for identifying such cases is the promisee's contractual interest whose central element is the aim that he pursues. The stipulated subject matter can never be used as a criterion for distinguishing pecuniary and non-pecuniary losses.

For similar reasons the next two subcategories also seem to overlap and so are difficult to distinguish from other cases where non-pecuniary losses could be inflicted. It is suggested that these two subcategories cover cases where the breach causes non-pecuniary harms despite the nature of the covenanted subject matter. It is said that this group includes cases where the performance does not confer an intrinsic financial value to the promisee. The case⁵⁰⁹ where the promisee engages a wedding photographer is identified as one instance. It might be objected that in these examples it is not so certain that the promisee will not receive something of financial value. The wedding photographs might have ethnographic, artistic or other scholarly value which may mean that their market price will not be nil. The fourth subcategory of this group is thought to include cases where a subjective non-pecuniary benefit is promised. This was considered to be the case in *Ruxley*. Nevertheless, there are some troubles with this example too. It has already been

⁵⁰² McKendrick, E and K. Worthington, *op. cit.*, at 300 *et. seq.*

⁵⁰³ *cf.* chapter 2, section A, subsection b, part *ii.*

⁵⁰⁴ McKendrick, E and K. Worthington, *op. cit.*, at 313-315.

⁵⁰⁵ *cf.* chapter 2, section C, subsection c, part *i.*

⁵⁰⁶ *Heywood v Wellers* [1976] QB 446.

⁵⁰⁷ McKendrick, E and K. Worthington, *op. cit.*, at 303.

⁵⁰⁸ *cf.* chapter 2, section A, subsection b, part *ii.*

⁵⁰⁹ *Diesen v Samson* 1971 SLT (Sh Ct) 49.

stated that it is difficult to justify the view that the construction of the swimming pool at the specific depth conferred any subjective non-pecuniary benefit on the promisee. It was established that the defective performance did not affect his ability to dive safely. This assessment was made from an objective perspective and did not include the promisee's personal feeling of safety which was not taken in consideration when his contractual interest was assessed.

The second group consists of cases where the non-pecuniary losses are suffered as a result of the breach. Four different subcategories are identified here – cases of physical injury, psychiatric illness, loss of reputation and physical inconvenience. One principal objection can be raised against this group of losses – it has already been established⁵¹⁰ that the breach itself determines neither the type nor the extent of the harms. Thus, there is no plausible explanation about the source of these losses. Moreover, it might also be noted that all harms are indirect outcomes of the breach. These deficiencies mean that there is a significant overlap in the proposed categorisation. Its inability to provide a clear and comprehensive classification of non-pecuniary losses is due to its lack of any coherent, consistent criterion by which these cases are categorised. The proposed division is neither based on the nature of the contractual subject matter nor on the outcomes of the breach. Despite these deficiencies, the analysis of the cases examined with regard to this classification has no parallel in terms of its rigour and depth in English legal literature thus far.

(ii) Principles of classification

It has been submitted⁵¹¹ that the quiddity of non-pecuniary losses is determined by their consequential nature. The purpose of the present part of this subsection is to continue the examination of the essence of non-pecuniary losses further. Although the main objective of all classifications is to identify a particular subcategory whose elements exhibit common features that are not shared with elements from other subcategories, this does not exclude the opportunity of further representation of the general nature of all non-pecuniary losses within the conceptual framework of such classification. That is achievable if the basis of the categorisation relates to a feature that is common to all of them. It has been argued⁵¹² that this is their consequential essence. Thus, a further examination of the mechanism by which these losses are inflicted has two separate advantages. First, it may provide more information about the causality between the non-delivery of the stipulated subject matter, the promisee's inability to achieve his contractual aims and the harms he suffers as a result of this. Second, this perspective may reveal more details about the mechanism by which the aims pursued by the promisee are attained.

It might be objected that an alternative criterion is also possible. Thus, it could be thought that, if all non-pecuniary losses are objective circumstances occurring at the time of breach, a principle aiming to distinguish the various facts that comprise all of these circumstances might be used. One of the classifications⁵¹³ that has been examined in the previous part is based on this idea. It aims to categorise non-pecuniary losses with regard to the manner in which they affect the promisee. Some injure his physical well-being, while others affect his mental welfare. Despite the apparent ease with

⁵¹⁰ *cf.* the present chapter, section A, subsection b, part *iii*.

⁵¹¹ *cf.* the present section, subsection b, part *i*.

⁵¹² *cf.* the present section, subsection b, parts *ii-iv*.

⁵¹³ Winterton, D., *op. cit.*, at 113.

which this classification divides non-pecuniary losses into two main groups, its usefulness for further study of the nature of non-pecuniary losses is doubtful. If a more detailed examination of one of the suggested groups is undertaken, it would push the analysis in a different direction. A further look at the different instances where the promisee's mental health is affected might not tell us anything more about the essence of non-pecuniary losses. Such an analysis may be able to identify all possible injuries that could affect his emotional well-being, but it will not be able to shine any further light on the inherent nature of non-pecuniary losses. Instead, it will provide a catalogue of all conceivable mental statuses in which the promisee might be placed.

This line of examination reduces the legal knowledge to a psychological survey that would not lead to the purported comprehensive characterisation of non-pecuniary losses. This principle of classification looks to the impact of the harms and the manner in which they affect the promisee. It is natural that, if this line of analysis is pursued further, it will provide additional understanding about the mechanisms by which the promisee responds to this mental collision. This topic is beyond the scope of the present analysis which is focused only on the nature of these losses. All the same, it will be different if the categorisation is based on another principle not associated with the inherent quiddity of the harms; for instance, their intangibility. But the fact that these losses may have or may not have a physical manifestation tells us nothing about their essence. This would merely shift the analysis away from the promisee's inability to achieve his non-pecuniary contractual aim to the forms in which these losses might manifest themselves. This would not be able to explain their intrinsic nature.

These deficiencies are not observed if the classification of non-pecuniary losses is founded on their consequential nature. Their further examination based on the mechanism by which they result from the promisee's inability to satisfy his contractual interest does not shift the focus of the analysis from their essence. Such a categorisation looks further into the particularities in which the harms are caused and the properties they exhibit. The principle upon which the purported classification of non-pecuniary losses is based also has a crucial role in revealing some additional aspects of their nature. Although it has been submitted that the criterion for categorisation must be founded on the consequential essence of the losses, this does not fully determine the content of the classification. There could be a number of specific principles of classification which apply the basic proposition that these losses derive from the unfulfillment of the promisee's contractual aims.

The classification explored in this subsection has a more general nature. It does not aim to lead to a catalogue of the countless particular forms that non-pecuniary losses can take. It examines their connection with the promisee's inability to achieve his non-pecuniary contractual aim. It has been submitted that the breach commences a complex causal chain of events which can lead to numerous injurious effects. Some of these harmful factual circumstances follow directly from the non-fulfilment of the promisee's non-pecuniary aim. They are referred to as primary non-pecuniary losses and are examined separately in the following part of this subsection. They are the first consequences of his inability to have his contractual interest satisfied. In *Hobbs* these losses were the inconvenience that was suffered as a result of the promisee being unable to reach his house after a short walk from Hampton Court railway station. On top of primary non-pecuniary losses, there are other harms that have more complex origin. They do not follow immediately from the promisee's inability to achieve his aim but are consequences of the promisee suffering other primary non-pecuniary losses. In *Hobbs*

the long walk caused further discomposure to the promisee and his companions who were unable to spend the whole night in the comfort of their house. These are secondary non-pecuniary losses and are explored at the end⁵¹⁴ of the present subsection.

(iii) Primary non-pecuniary losses

It has already been argued that there are certain contracts where the promisee has a primary non-pecuniary contractual interest.⁵¹⁵ In these agreements he aims to achieve something other than, or along with, an increase in his patrimonial wealth. If, as a result of the non-performance, this does not happen, he will suffer primary non-pecuniary losses. They will be a direct consequence of his inability to attain his primary aims pursued with the agreement. There have been a number of examples provided in the present thesis which illustrate the wider scope that the promisee's primary non-pecuniary contractual interest might have. In *Hobbs* the promisee and his companions' primary aim was to be able to walk to their house from Hampton Court railway station. Their inability to achieve this was caused by the other party's non-performance, who left them at another station which was too far from their house. The primary non-pecuniary losses that the promisee and his family suffered were a direct result of their inability to walk home and consisted of 'inconvenience suffered in consequence of being obliged to walk home'.⁵¹⁶

In the other cases that have been explored previously,⁵¹⁷ the promisees' inability to achieve their primary non-pecuniary contractual aims led to their suffering primary non-pecuniary losses. In *Jarvis* the promisee wanted to enjoy an 'invigorating and amusing holiday'⁵¹⁸ in the Swiss Alps. He was not able to do this and, as a result, he suffered certain primary non-pecuniary losses. In contrast to *Hobbs*, the contractual aims pursued by the promisee here were much broader. This determined the relatively larger scope of the non-pecuniary losses he suffered as a result of his incapability to enjoy the promised winter vacation. The promisee suffered 'disappointment and distress at the loss of the entertainment and facilities for enjoyment which he had been promised'.⁵¹⁹ The consequential nature of the harms is directly acknowledged in the judgement which describes them as 'loss of benefit which the plaintiff reasonably expected to derive from the contract'.⁵²⁰ Further references to the promisee's harms describe them as 'annoyance and mental distress'.⁵²¹ All of these non-pecuniary losses have primary nature. The promisor did not provide the holiday that was due, and this resulted in the other party's inability to achieve his primary non-pecuniary aims.

The origin of the primary non-pecuniary losses in *Watts* was the same. The promisees' aim was to find a country house which did not need substantial renovation. As a result of the breach, this did not happen. The property needed extensive repairs that caused 'distress, worry, vexation and inconvenience'.⁵²² The promisees provided very detailed descriptions

⁵¹⁴ *cf.* the present subsection, part *iv*.

⁵¹⁵ *cf.* chapter 2, section *B*, subsection *c*, part *iii*.

⁵¹⁶ *Hobbs*, *op. cit.*, at 111.

⁵¹⁷ *cf.* chapter 1, section *A*, subsection *a*.

⁵¹⁸ *Per* Lord Edmund Davis, *Jarvis*, *op. cit.*, at 239.

⁵¹⁹ *Jarvis*, *op. cit.*, at 233.

⁵²⁰ *Ibid.*

⁵²¹ *Per* Lord Denning, *Jarvis*, *op. cit.*, at 235.

⁵²² *Watts*, *op. cit.*, *per* Lord Ralph Gibson, at 1427.

of their non-pecuniary losses inflicted as a result of the non-fulfilment of their primary contractual aim,⁵²³ including the specific intolerable conditions which they had to endure during the construction works. The judgments contain a full account of the factual circumstances in which the promisees were placed as a result of the breach. The refurbishment led to a great deal of disruption to the promisees' lives. They suffered vexation, distress and inconvenience by being unable, for this time, to live in the comfort of their house as they would have done had the contract been performed.

In *Farley* the promisee's primary non-pecuniary aim was to be able to buy 'a gracious country residence'⁵²⁴ which was not affected by aircraft noise. His inability to achieve this, which was a direct consequence of the breach, caused him certain primary non-pecuniary losses. In the judgment they are associated with the promisee's deprivation of 'pleasure, relaxation, and peace of mind'.⁵²⁵ This reference reveals the consequential nature of these non-pecuniary losses. They are further described as 'real discomfort' and 'an inconvenience to the plaintiff which is not a mere matter of disappointment or sentiment'.⁵²⁶ The losses are not seen as 'disappointment at the absence of the expected pleasure but ... inconvenience'.⁵²⁷ This perception demonstrates their primary nature. They consisted of 'inconvenience of the noise, the invasion of the peace and quiet which he expected the property to possess and the diminution in [the promisee's] use and enjoyment of the property on account of the aircraft noise'.⁵²⁸ All these harms are direct outcomes of his inability to achieve his primary non-pecuniary aim – to select a property which was not affected by aircraft noise.

The specific feature of primary non-pecuniary losses is their closer relationship with the stipulated subject matter. They derive from the promisee's inability to enjoy its usual properties and qualities as he planned. They harm him because they are the outcomes of the non-fulfilment of his primary contractual aims. Their forms of materialisation are very diverse. Indeed, the factual circumstances in which the promisee is placed as a result of his inability to achieve his primary non-pecuniary aims are countless. They are not restricted in any manner by the primary nature of these losses. The fact that he suffers fright, disappointment, frustration or vexation cannot in any respect be predetermined by the primary nature of losses. This demonstrates that the external boundaries of the primary non-pecuniary harms are very wide. The only restriction that might be conceivable in such cases is related to their origin– they have to be a direct consequence of the non-fulfilment of primary non-pecuniary contractual aims.

(iv) Secondary non-pecuniary losses

Apart from the cases explored in the previous part of the present subsection,⁵²⁹ there are instances where the promisee might have subsequent non-pecuniary contractual aims. In these contracts, the non-pecuniary aim the promisee pursues is not directly attributable to the main properties or qualities of the stipulated subject matter. Rather they are subsequent aims which he seeks to attain as a result of the fulfilment of his primary aims and whose achievement will provide

⁵²³ *Ibid.*

⁵²⁴ *Farley, op. cit.*, at 741.

⁵²⁵ *Farley, per Lord Steyn, op. cit.*, at 748.

⁵²⁶ *Farley, per Lord Browne-Wilkinson, op. cit.*, at 754.

⁵²⁷ *Ibid.*

⁵²⁸ *Ibid.*

⁵²⁹ *cf.* the present subsection, part *iii*.

something other than an enhancement of his financial standing. This is true in many cases, where the promisee wants to obtain the stipulated subject matter not merely for its immediate properties or qualities but to use them for some further purposes.⁵³⁰ In *Hobbs*, had the contract been performed and had the promisee been able to reach his house after a short walk, he and his family would have been able to spend the night in the comfort of their home. This was their subsequent non-pecuniary contractual aim which was achieved only partially. As a result of the breach, they had to spend a significant part of the night walking in a drizzling and cold night. This caused them secondary non-pecuniary losses, which consisted in the inconvenience of being unable to enjoy the comfort of their house for some time.

A similar pattern can be discovered in other cases too. In *Watts* the promisees had to refurbish their house. While their primary aims were to obtain a property that did not need substantial modernisation, they also had some other subsequent aims with the agreement. They wanted to be able to entertain their guests in the house⁵³¹ and it could be assumed more generally that their secondary non-pecuniary aims related to their desire to use the property for all other purposes that could be reasonably expected in such circumstances.⁵³² The breach deprived them of this opportunity. It did not only force them to suffer significant distress and vexation, due to the extensive renovations that had to be undertaken, but it also prevented them from achieving their subsequent non-pecuniary aims to be able to enjoy the comfort of their country house. This led to further non-pecuniary losses – they suffered additional inconvenience and discomfort. The distinction between the primary and subsequent aims might sometimes appear to be delicate but it illustrates the great extent of the non-pecuniary losses that the breach can cause in such cases.

In *Ruxley* the promisee achieved his primary non-pecuniary contractual aim despite the defective performance. He was able to dive safely in his swimming pool despite its being shallower than stipulated. In all cases when the primary non-pecuniary aims are achieved, all subsequent contractual aims will also be achieved. This is due to the causal relationship that exists between them. If the promisee is able to dive safely into the pool, he will also be able to use all other subsequent benefits that follow from that. It might be imagined that the promisee in *Ruxley* wanted to be able to dive so that he could keep himself fit or because he wished to train for participation in a sporting event. In both cases these subsequent non-pecuniary aims would be attainable if the primary aim was achieved as well. This would be subject to exceptions in the cases where the causal relationship between the subject matter and the aims does not exist.⁵³³ Conversely, the promisee's inability to attain his primary aim will always lead to non-achievement of his subsequent aims. This explains why primary non-pecuniary losses are not the immediate reason for the infliction of secondary non-pecuniary losses. It is the relationship between the primary and subsequent aims that defines the type and extent of the harms suffered by the promisee. This in turn illustrates the general role that the promisee's aims play with regard to the origin and the nature of his losses.

The subsequent nature of these aims determines the lack of a direct relationship between the stipulated subject matter and these losses. If the above examples are explored further, it will be seen that the correlation between the promisee's

⁵³⁰ cf. chapter 2, section C, subsection c, part iii.

⁵³¹ *Watts*, op. cit., per Lord Ralph Gibson, at 1427.

⁵³² cf. chapter 2, section B, subsection a, part iii.

⁵³³ cf. chapter 2, section B, subsection b, part i.

desire to keep himself in a good physical shape and the construction of a swimming pool is not immediate. A similar conclusion can be reached in *Watts* if the promisees' desire to entertain their guests in their newly purchased countryside house is compared to their contract for the provision of a property survey. The proposed classification of non-pecuniary losses allows for a more detailed account of the harms that are caused as a result of the breach. This categorisation takes into consideration some consequential non-pecuniary losses which could be overlooked easily or remain undistinguished from the overall harms caused as a result of the breach. It further demonstrates that the consequential nature of the secondary non-pecuniary losses is not related to their being caused by other harms. They result from the promisee's inability to attain his subsequent non-pecuniary aims, which is in turn caused by the non-fulfilment of his primary aims. Thus, non-pecuniary harms can have very wide adverse effects both on the primary and the consequential non-pecuniary contractual interest of the promisee. They can take various forms and may affect many aspects of his well-being.

The causal connection between primary and secondary non-pecuniary losses is indirect. The losses the promisee suffers always result from his inability to achieve a certain contractual aim. If the losses are primary, then they will result from the non-fulfilment of his immediate aim which is a constitutive element of his primary non-pecuniary contractual interest. If the losses are secondary, they are the result of the promisee's inability to attain his subsequent non-pecuniary aim. The subsequent aims can be achieved as a result of the immediate aims being fulfilled. Thus, in *Hobbs* the promisee and his family would have been able to spend the night in the comfort of their beds only if they were able to walk to their house. The secondary non-pecuniary losses which were caused as a consequence of the promisee's and his companions' inability to spend the night in their house are not identical with the inconvenience and discomfort that were caused from the long night walk. Thus, the promisee might suffer the same instantiation of non-pecuniary losses more than once in a single contractual relationship and the classification that is proposed here provides better opportunity for a more comprehensive identification of all losses suffered as a result of the breach.

Conclusion to subsection c

Classifications based on the divergent forms of instantiations which the non-pecuniary losses might exhibit do not provide an insightful perspective on the inherent nature of these harms. There have been some attempts to categorise these losses based on the manner in which they are manifested or the way in which they affect the promisee. All classifications exhibit different deficiencies that prevent them from providing a thorough and exhaustive representation of the essence of these harms. A more profitable approach to categorisation is based on the consequential nature of non-pecuniary losses. Thus, the promisee's incapability to attain his contractual aims provides a helpful principle on which a possible classification might be created. Some losses result from the non-achievement of the immediate aims that the promisee pursues with the agreement. Other losses are the outcomes of the promisee's inability to reach his consequential aims. Both groups can affect his non-pecuniary contractual interests severely. They deprive him of the beneficial outcomes of the performance that he legitimately expects to receive and cause a wide variety of harms which affect different aspects of his non-pecuniary well-being simultaneously.

The classification of non-pecuniary losses proposed in the present subsection demonstrates the wide scale of the harmful effects that the promisee might suffer when his non-pecuniary contractual interest is not satisfied. The division between

primary and secondary losses provides a more detailed and comprehensive perspective on the precise mechanisms by which breach causes specific harms to him. This categorisation demonstrates the importance of the consequential nature of these losses and their causal connection to the elements of the promisee's non-pecuniary contractual interest. Other scholarly works explore specific types of non-pecuniary harms, but they are unable to clarify the origin of these losses and their relationship with other components of the contractual relationship. None of these previous accounts explains the reasons why different types and forms of non-pecuniary losses can be caused in contracts with identical subject matters. The present analysis provides an insightful perspective on this question, without leading to inconsistencies with the general principles of the contemporary contract law theories.

Conclusion to section B

Although within the English legal literature there are no scholarly attempts at defining non-pecuniary losses or providing detailed examinations of their nature, it is usually thought that the non-performance of the contract is the instigating moment in which they are conceived. This assumption is partially true, but it does not explain the precise mechanism by which the losses are caused or their relationship with the other elements of the contractual relationship. There is a connection between the covenanted subject matter and the losses which result when it is not conferred, but it is not direct. As established previously,⁵³⁴ the promisee chooses the stipulated subject matter on the basis that this would lead to achievement of specific aims that he pursues. When these aims are not fulfilled, certain consequences follow. Where those aims are non-pecuniary, all of these consequences are non-pecuniary losses. The adoption of this new perception provides a more general perspective on the nature and the particular features of the losses. Thus, the non-pecuniary losses are apprehended much more broadly. It is understood that they are caused in a greater number of contracts than previously thought and that they affect the promisee's contractual interest much more extensively and widely. Their infliction is not related to the nature of the subject matter of the agreement but to the promisee's failure to attain his contractual aims.

While the importance of the contractual aims has been outlined previously,⁵³⁵ the perspective of the present section from which the relationship between the covenanted subject matter and the aims has been explored is negative. The purpose of the analysis here is not to define in what types of contractual relationship certain sorts of losses can be inflicted. Rather, it seeks to explain how the non-fulfilment of the aim defines the nature and the contents of the resulting harms. This additional perspective allows for a better understanding of the consequential nature of the losses within the setting in which they originate. Indeed, all consequences following from the non-attainment of all immediate or consequential non-pecuniary aims are non-pecuniary losses. There are no alternative ways in which such harms can be inflicted. This causal relationship also leads to a lack of any specific limitations with regard to the factual circumstances that can amount to losses. The only restrictions that might be established in this respect relate to the particular circumstances of the individual contractual relationship where the losses are caused. Hence, the whole state of affairs in which the promisee might be placed amount to non-pecuniary losses invariably in so far as they result from his incapability to achieve his contractual aims.

⁵³⁴ *cf.* chapter 2, section B, subsection b, part i.

⁵³⁵ *cf.* chapter 2, section B.

This broader perspective on losses is finally enriched by their classification. There is no better way of understanding their intrinsic nature than to look further into their consequential essence. This allows for a distinction between various forms which these harms can assume in general and the specific injurious effects that they might have on the promisee in a particular contractual relationship. Although the promisee may in principle suffer mental distress, vexation, physical inconvenience and other forms of non-pecuniary losses, this general appellation is not of particular use for the purposes of the present analysis. What matters is the specific non-fulfilment of each non-pecuniary aim that the promisee has in an individual contract. In such cases it is entirely irrelevant how the deprivation of these aims will be labelled. This is so as the whole factual situation in which he is placed as a result of his inability to achieve his aims expresses his non-pecuniary losses. It might be possible that sometimes this is described with a single term like physical inconvenience or sorrowfulness but in many other cases that would not suffice. A more detailed description of the position in which the promisee is left as a result of this incapability to attain his non-pecuniary aims actually represents his non-pecuniary losses.

Lastly, it should be noted that, in identifying the extent of these losses, no examination of his general factual position is required. This would be impossible – any natural or legal person is involved in countless relationships which define an extremely complex state of affairs in which one is placed in any given moment. Its complete description with all its details and particularities is impossible. The identification of the non-pecuniary losses requires exploration of the promisee's situation in which he is left as a result of his deprivation of the pursued non-pecuniary aims. Although this limitation decreases the descriptive task needed for a complete identification of the full extent of the losses, it also requires a separate characterisation of every single element of the promisee's factual position in which he is to be found as a result of his inability to achieve each non-pecuniary aim. The harmful effects of the non-pecuniary losses are limited to their being an outcome of the non-attainment of the contractual aim but for any such single non-attainment, the promisee suffers separate non-pecuniary harms. This perspective should lead to greater recognition of the wider scope and incidence of these losses, the precise mechanism of their origin and the manner in which they affect the promisee.

Conclusion to Chapter Three

The breach has been examined in other contexts many times,⁵³⁶ but no previous authors have explored its effects on the promisee's contractual interest and its precise role in the causal chain of events that leads to infliction of non-pecuniary losses. Regardless of the particular factual circumstances in which the non-performance is materialised, the promisee's inability to achieve his aims is the only factor that defines the nature and the scope of the harms that he suffers. The breach would matter in so far as it leads to this outcome but not in other cases where no losses would be caused at all. The law does not remain indifferent to instances where the non-performance leads to the promisee's incapability to fulfil his aims and introduces certain changes to his contractual interest. These changes aim either to afford an alternative route in which the aims could be achieved or to provide a new right for substitutive compensation. None of these alternative manners for redress requires provision of the stipulated subject matter because the promisee's interest is not

⁵³⁶ *cf. e.g. Chitty, op. cit.*, para 24-001 *et. seq.* and the literature referenced therein.

related directly to it. Thus, the contractual interest is not a mere measure of the losses but their source which determines their type and content.

Non-pecuniary losses are not deriving directly from the breach. They are all consequences resulting from the non-fulfilment of the promisee's aims. Indeed, this is the only source from which such harms can be caused. This new understanding of non-pecuniary losses reveals the wider scope that they can assume and their extensive injurious effects affecting the promisee's non-pecuniary contractual interest. Their comprehensive description in a single contractual obligation would involve a complete identification of the promisee's factual position in which he is to be found as a result of the non-performance. Thus, it might happen that in a particular agreement he might suffer the same form of non-pecuniary losses more than once, coming from different unfulfilled contractual aims. A complete and exhaustive description of the harms that are bedevilled in such cases will entail an identification of all non-pecuniary aims that would have been pursued with the agreement and the consequent failure of their achievement.

The contracts are concluded for various reasons which may not be reflected explicitly in their terms. Despite that the losses that are incurred as a result of non-performance are dependent on these further considerations that prompt the formation of the agreement and a more accurate representation of the contractual relationship requires certain acknowledgement of these aims. The present thesis develops a theory that takes these reasons into account and explains the nature of the losses with regard to this understanding. Other authors might offer alternative conceptions where the causation of non-pecuniary losses could be explained from different perspectives. Nonetheless, all understandings which are favouring the relationship between the contractual subject matter and losses and ignoring the relationship between the non-fulfilment of the aims and the losses, will not be able to produce the type of account which the present thesis has purported.⁵³⁷ They will fail to explain the rationale that stands behind the infliction of losses. This failure is particularly noticeable in cases where the promisee's aims are not limited to his financial enrichment. All alternative understandings cannot explain why the promisee suffers non-pecuniary losses when he is deprived of something that has objective pecuniary value.

4. Further studies

It is impossible to undertake a study of damages if the nature of the losses that need to be compensated is not explored. The purpose of the present thesis is to provide the requisite scholarly grounds from which this could be feasible. The examination of the essence of non-pecuniary losses demonstrates the larger number of cases where they are inflicted and the wider scope of their injurious effect on the promisee's non-pecuniary contractual interest. The study of damages for non-pecuniary losses ought to be continued from this perspective. The objectives of the present very short chapter are to outline the three general topics that could be explored in continuation of the present thesis.

A. Compensation of damages for non-pecuniary losses

⁵³⁷ *cf.* chapter 1, section C.

The problem of compensating non-pecuniary losses has troubled the law and legal scholars for a significant amount of time. The principal position – that they are recoverable only in exceptional cases – has been met with reluctance and even criticism.⁵³⁸ If this question is approached through the perspective of the present work, an important discrepancy is noticeable immediately: while non-pecuniary losses are a common outcome of breach, their compensation seems to be an exception. Besides this, there are no arguments based on an analysis of their nature, as offered in the present work, which justify their partial indemnification. Indeed, the essence of non-pecuniary losses suggests that they should be recovered in all cases where they result from the promisee's inability to achieve his non-pecuniary contractual aims.

B. Assessment of damages for non-pecuniary losses

The promisee's non-pecuniary contractual interest after breach⁵³⁹ provides the basis for a new approach to the quantification of the damages for non-pecuniary losses due to him. In cases when he has an interest in later performance, he should be entitled to receive a substitutive subject matter or, alternatively, a different performance, so long as it leads ultimately to achievement of the aim that he pursues with the agreement initially. In this case the main purpose of the damages is to pre-empt the harms and prevent their future suffering. If the promisee does not have an interest in later performance, his damages should be quantified with regard to a different principle. This new measure of indemnification does not entail any commensurability of the damages with other elements of the contractual relationship.⁵⁴⁰ It ought to provide a fair compensation that can be a just substitution of the promisee's incapability to achieve his non-pecuniary contractual aims.

C. Limits of damages for non-pecuniary loss

The methods of limiting damages have a general nature. All of them – causation, remoteness and mitigation – can be explored in more detail in contracts where the promisee pursues a non-pecuniary contractual aim. This provides an opportunity for more nuanced views of certain principles that have been assessed traditionally in predominantly commercial context. Thus, the requirements of contemplation or knowledge of special circumstances, when the remoteness of damages is considered, might be understood differently than the approach which is adopted in the legal literature currently.⁵⁴¹

Each of these topics allows for a detailed analysis which could exceed easily the word count of a doctoral thesis. The examination of these questions is no doubt important but must, therefore, be left for another time.

⁵³⁸ For a more detailed review, *cf.* chapter 1, section A, subsection b.

⁵³⁹ *cf.* chapter 2, section A, subsection c, parts i-vi.

⁵⁴⁰ *cf.* chapter 2, section C, subsection a, parts i-iii.

⁵⁴¹ Peel., E., *op. cit.*, para 20-103 *et. seq.*

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